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Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~155~~ 21

MARIO DiBELLA, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1960
CERTIORARI GRANTED FEBRUARY 20, 1961

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Docket Entries

(A)

M-2225 Docket

**In the Matter of the Application
of
MARIO DI BELLA**

ATTORNEYS

For Plaintiff:

**JEROME LEWIS
66 Court Street
Brooklyn 1, N. Y.**

(B)

June 17/59 Affidavit and Notice of motion filed for an order suppressing all evidentiary items seized by the Agents of Federal Bureau of Narcotics, etc. (returnable before Inch, J. on July 6, 1959)

July 6/59 Before Inch J. Motion to Suppress etc.—Adj'd to Aug 3/59

Aug. 3/59 Before Zavatt J. Motion to Suppress etc.—Adj'd to Aug 24/59 on consent.

Aug. 24/59 Before Rayfiel, J: Motion to suppress, etc. adj'd. to Aug. 25, 1959 at 11:30 A.M.

Aug. 25/59 Before Rayfiel, J: Motion to suppress, etc. Motion argued. Decision reserved. Exchange papers Sept. 8, 1959 and all papers by September 11, 1959.

Docket Entries

- Sept. 11/59 Affidavit filed (Charles L. Stewart)
- Sept. 14/59 Affidavit filed (Jerome Lewis)
- Sept. 22/59 Minutes of stenographer filed.
- Nov. 4/59 By Rayfiel, J: Opinion rendered (See Opinion) Motion denied without prejudice, however, to a renewal thereof on the trial. Settle order on notice.
- Nov. 30/59 By Rayfiel, J: Order filed on above motion.
- Dec. 3/59 Notice of Appeal filed (Mario Di Bella)

Notice of Motion to Suppress Evidentiary Items, etc.

(43) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIR :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Mario Di Bella, the petitioner herein, sworn to the 17th day of June, 1959, and the complaint of Special Agent David W. Costa, of the Federal Bureau of Narcotics, sworn to the 15th day of October, 1958, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Criminal Term for Motions, to be held before the Hon. Robert A. Inch, in Room 312, on the 6th day of July, 1959, at the Courthouse located at 271 Washington Street, Brooklyn, New York, at 10 o'clock in the forenoon thereof, or as soon as counsel can be heard, for an order suppressing all evidentiary items seized by the Agents of the Federal Bureau of Narcotics, on or about March 9th, 1959, in the petitioner's apartment at No. 35-15 80th Street, Jackson Heights, Queens, New York, and any and all information gleaned from the said seizure, on the ground that the said seizure was illegal and the search unlawful, in violation of the Fourth Amendment of the United States Constitution and Rules 3, 4 and 41 (e) of the Federal Rules

Notice of Motion to Suppress Evidentiary Items, etc.

of Criminal Procedure, and for such other and (44) further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
June , 1959

Yours, etc.,

JEROME LEWIS
Attorney for Petitioner

To:

HON. CORNELIUS W. WICKERSHAM, JR.
U. S. ATTORNEY, EASTERN DIST. OF N. Y.
271 Washington Street
Brooklyn, New York

**Affidavit of Mario Di Bella Read in Support
of Motion to Suppress, etc.**

(45) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

MARIO DI BELLA, being duly sworn, deposes and says:

I am the petitioner in the above-entitled proceeding and submit my affidavit in support of the within application for an order suppressing the use by the Government in any criminal proceeding of any or all of the evidentiary items seized by Agents of the Federal Bureau of Narcotics on or about March 9th, 1959, in my apartment at premises 35-15 80th Street, Jackson Heights, Queens, New York, on the ground that the said seizure was illegal and the search unlawful, in violation of the Fourth Amendment of the United States Constitution and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure.

On or about March 9th, 1959, Agents of the Federal Bureau of Narcotics came to my apartment and after exhibiting to me a warrant for my arrest dated October 15, 1958, proceeded to make a general exploratory examination of my apartment. They discovered a quantity of narcotics in my apartment and seized said narcotics and in addition thereto a suitcase, miscellaneous papers, my passport and divers other items.

Affidavit of Mario Di Bella

I have been advised by my attorney, Jerome Lewis, Esq., that in his opinion the said search and seizure was illegal in that the warrant of arrest which was granted by the United States Commissioner for the Eastern District of New York, based upon the complaint of Special Agent David W. Costa of the Federal Bureau of Narcotics, was fatally defective in that the allegations in the said complaint did not spell out probable cause and that the granting of the said warrant, therefore, was in violation of the Fourth Amendment of the Constitution of the United States and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure.

Deponent respectfully urges that this application to suppress be granted and that the Government be estopped from using said items in any criminal proceeding and any information gleaned therefrom.

(Sworn to by Mario Di Bella, Petitioner on June 17, 1959.)

**Complaint of Special Agent David W. Costa Read in
Support of Motion to Suppress, etc.**

(47) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

EASTERN DISTRICT OF NEW YORK, ss:

DAVID W. COSTA being duly sworn deposes and says that he is a Special Agent of the Federal Bureau of Narcotics, duly appointed according to law and acting as such.

That upon information and belief, the defendants, Mario Di Bella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law. (T. 26 U. S. C. Par. 4704 (a); T. 18 U. S. C. Par. 2).

That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics.

WHEREFORE, your deponent respectfully prays that a warrant be issued for the apprehension of the above-named defendants, that they may be dealt with according to law.

(Sworn to by David W. Costa on October 15, 1958.)

**Affidavit of Charles L. Stewart Read in Opposition
to Motion**

(48) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

EASTERN DISTRICT OF NEW YORK, ss.:

CHARLES L. STEWART being duly sworn deposes and says that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

This affidavit is submitted in opposition to the defendant Mario Di Bella's motion to suppress any and all evidence seized in his apartment at the time of his arrest on March 9, 1959. As grounds for his motion, Di Bella alleges that the warrant for his arrest was based on a complaint which does not properly set forth probable cause.

That upon information and belief, the facts of the defendant's arrest are as follows:

FACTS

The defendant Mario Di Bella was arrested in his apartment No. 42 at 35-15 80th Street, Queens, New York, on March 9, 1959, at approximately 8:15 P.M., by Federal Narcotics Agents, David W. Costa, George O'Connor and James P. Murray. Agent Costa was in possession of a warrant for the arrest of Mario DiBella, which had been issued by the United States Commissioner for the Eastern

Affidavit of Charles L. Stewart

District of New York on October 15, 1958. Application had been made on October 6, 1958, for a search warrant to search the apartment of (49) Mario DiBella and a complaint and warrant for the arrest of DiBella was prepared the same day. The application for the search warrant was denied by United States Commissioner Salvatore T. Abruzzo, but the complaint and arrest warrant were not presented to the United States Commissioner. Thereafter, on October 15, 1958, the complaint and arrest warrant were submitted to the U. S. Commissioner charging the defendant DiBella with the sale of narcotics on September 10, 1958, in violation of §4704(a) of Title 26 U. S. C. and §2 of Title 18 U. S. C. The complaint and arrest warrant which had been prepared on October 6, 1958 was used and the U. S. Commissioner changed the date on the complaint from October 6, 1958 to October 15, 1958. However, he did not change the date on the arrest warrant. He noted on the complaint that "2 Warrants Issued". The arrest warrant referred to the complaint, charging the sale of narcotics on September 10, 1958, and the disparity in the dates is clearly a clerical error. A copy of the arrest warrant and the complaint are attached hereto as Appendix "A".

On March 9, 1959, the narcotic agents saw the defendant DiBella sitting in his living room in his apartment shortly before they went to the door of Apartment No. 42. The agents rang the bell of the apartment. The door was opened by Jean DiBella, a step-daughter of the defendant. The agents identified themselves to her at once. They showed her their credentials. Jean DiBella then ushered the agents into the apartment. Mario DiBella was in the (50) living room. The narcotics agents identified themselves to Mario DiBella. They then showed him a copy of the warrant for

Affidavit of Charles L. Stewart

his arrest and also showed a copy of the arrest warrant to DiBella's wife, Elsie. Agents Coyne and Gohde then joined the other agents in the apartment. The agents asked Di Bella if he would permit them to make a search of the apartment. DiBella then told Agent Coyne "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." The defendant DiBella then took the agents to his bedroom and pointed to a closet where the heroin was hidden. Agent Costa removed a brown suitcase from the floor of the closet and placed it on the bed. The suitcase was then opened. It contained approximately a pound of heroin, a quantity of cocaine and certain paraphernalia used to "cut" the narcotics. DiBella stated that this was all the heroin that he had in his possession and that the suitcase contained approximately eighteen to nineteen ounces of heroin altogether.

The agents requested that DiBella's family take possession of their valuable before a search was made of the apartment. Mario DiBella produced a locked, metal box containing \$2,675.00. The agents then began to search the apartment for contraband. Agent O'Connor found \$6,000.00 in a shoebox hidden in a closet in DiBella's bedroom.

When brought to the office of the United States Attorney prior to his arraignment on March 9, 1959, DiBella admitted that this money, \$8,675.00 represented profits which he had made in the sale of narcotics. He stated that (51) he had bought and sold heroin over a period of years and tentatively identified his source of supply and his customer. He also admitted that he had voluntarily turned over the seized heroin to the agents at the time they visited his apartment to arrest him.

Affidavit of Charles L. Stewart

Prior to the arrest of the defendant DiBella, Narcotics Agents David W. Costa, and Daniel W. Moynihan, observed the defendant DiBella on two occasions, when he participated in the sale and transfer of heroin. The facts setting forth these observations are more fully set forth in the attached affidavit of Narcotics Agent David W. Costa, the arresting agent (See Appendix "B") and the affidavit of Narcotics Agent Daniel W. Moynihan (See Appendix "C"). These affidavits were prepared in application for the search warrant on October 6, 1958, and were on file with the U. S. Commissioner. These two agents worked together; they were in charge of the case, and the information contained in both affidavits were known to both men.

Agent David W. Costa, the agent who arrested DiBella on March 9, 1959, had observed the defendant DiBella meet with the defendant Samuel Panzarella on August 26, 1958 and on September 10, 1958. On each occasion, this meeting took place minutes before the defendant Panzarella sold narcotics to Agent Daniel W. Moynihan. Agent Costa had also observed the sale of narcotics by Panzarella to Agent (52) Moynihan, immediately following Panzarella's meeting with DiBella. In addition, the defendant Panzarella made statements to Agent Moynihan identifying the defendant DiBella as the source of all narcotics which he sold to Agent Moynihan. Further, Panzarella told Agent Moynihan that the defendant DiBella had been engaged in the illicit traffic of narcotics for many years.

It is apparent from the foregoing that Agent Costa had probable cause to arrest the defendant DiBella without a warrant at any time after the two sales of narcotics on August 26, 1958 and September 10, 1958.

*Affidavit of Charles L. Stewart***THE SEIZURE OF NARCOTICS AND MONEY WAS MADE
INCIDENTAL TO A LAWFUL ARREST**

The arrest warrant was based on a valid complaint (See Appendix "A") which set forth not only the facts of the offense, but also the facts on which the affiant based his conclusion that the defendant DiBella had committed this crime. The source of the complainant's information, and the grounds for his belief were set forth in the complaint as "your deponent's personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics." Here, the complainant's probable cause was based on both his personal knowledge and hearsay information. It is apparent that the United States Commissioner had before him sufficient facts upon which finding of probable cause could be made.

(53) The case of *United States v. Giordenello*, 357 U. S. 480 (1958), cited by the defendant DiBella in his Supplemental Memorandum of Law does not apply to the instant case. In the latter case, only the elements of the crime charged were set forth in the complaint. No statement whatsoever was made by the complainant as to whether the charge in the complaint was based on personal knowledge or whether it was based on information and belief. With respect to the absence of such a statement the Court stated at page 486:

"The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts

Affidavit of Charles L. Stewart

relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

In the instant case, the affidavits of Agents Costa and Moynihan in support of the application for a search warrant were already on file with the United States Commissioner's office. Although these affidavits set (54) forth in greater detail the probable cause which these agents had to arrest DiBella they were superfluous here, as probable cause was plainly spelled out on the face of the complaint.

In the *Giordenello* case *supra*, the Court suppressed the evidence seized incidental to the arrest of the defendant. However, the Court specifically left open to the government the right to justify the defendant's arrest without relying on the warrant in the event of a new trial. The Court stated at p. 488:

"Nor do we think that it would be sound judicial administration to send the case back to the District Court for a special hearing on the issue of probable

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cause which would determine whether the verdict of guilty and the judgment already entered should be allowed to stand. The facts on which the Government now relies to uphold the arrest were fully known to it at the time of trial,² and there are no special circumstances suggesting such an exceptional course. Cf. *United States v. Shotwell Mfg. Co.*, 355 U. S. 233. This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant."

Even more recently, the Supreme Court in *Draper v. United States*, 358 U. S. 307 (1959) specifically upheld a seizure of narcotics as incidental to a lawful arrest, where the arrest was made by a narcotics agent on the basis of hearsay information alone. In the latter case an informer had given information to a narcotics agent that the defendant Draper would arrive in Denver, Colorado, on or about (55) a certain date, carrying narcotics. The informer had been reliable in the past, and gave the agent a description of the defendant Draper. The agent arrested Draper, searched his person, and found heroin. The defendant Draper made a motion to suppress the evidence seized. This motion was denied and the heroin was admitted as evidence against the defendant at his trial. On conviction, the defendant Draper appealed on the grounds (1) that hearsay information was inadmissible at any trial and should not have been considered by the arresting agent, and (2) that even if it could be considered, it was insufficient to constitute probable cause. The Supreme Court affirmed the conviction, holding that the arrest and search were legal. In discussing the elements required to give probable cause, the Court stated at page 313:

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“ ‘In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’ *Brinegar v. United States, supra*, at 175. Probable cause exists where ‘the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that ‘an offense has been or is being committed.’ *Carroll v. United States*, 267 U. S. 132, 162.”

A situation nearly identical to that in the instant case arose in *Lathem v. United States*, 259 F. 2d 393 (5th Cir. 1958). The defendant challenged the sufficiency of the warrant on the grounds that the complaint was inadequate in failing to set forth probable cause. In overruling (56) this contention the Court held at pp. 397-398:

“Appellant challenges the sufficiency of the warrant on the ground that the complaint was inadequate because it was based on hearsay statements by Slotnik, the complaining officer. *Brown v. State of Mississippi*, 1936, 297 U. S. 278, 286, 56 S.Ct. 461, 80 L. Ed. 682.

Slotnik formulated all the plans of the investigation, accompanied the other agents on each trip to Lathem's drug store, and in fact participated in the illegal sales. He provided the marked money, instructed the agents what to do, stood just outside the window of the drug store, observed the negotia-

Affidavit of Charles L. Stewart

tions with Lathem. Slotnick saw Rand pay Lathem, saw Rand receive the morphine, followed Rand from the drug store, and took the morphine into his custody. It cannot be said that the complaint was based on hearsay.

7 Nor can it be said that the complaint was defective, under the recent decision in *Giordenello v. United States*, 1958, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503. The Supreme Court declined to pass on whether a warrant may be issued solely on hearsay. The Court held that the complaint was defective because it contained [357 U. S. 480, 78 S. Ct. 1250] 'no affirmative allegation that the affiant spoke with personal knowledge'; and did 'not indicate any sources for the complainant's belief'. The Court justified the holding, in part, on the ground that the complainant's testimony 'clearly showed that he had no personal knowledge of the matters on which his charge was based'. Here, it is clear that Slotnik had personal knowledge, based his charge on knowledge, not belief, and that the complaint is an affirmative statement from an affiant with personal knowledge. Unlike the *Giordenello* case, the Commissioner could determine whether there was probable cause for issuance of the warrant. He did not have to accept a mere conclusion. Lathem had the full protection he was entitled to under Criminal Rules 3 and 4, 18 U.S.C.A., and the Fourth Amendment."

(57) In the instant case, Agent David W. Costa had probable cause to arrest the defendant DiBella at any time after September 10, 1958, with or without a warrant (T. 26

Affidavit of Charles L. Stewart

U. S. C. (Supp. V) § 7607, added by 104(a) of the Narcotic Control Act of 1956).

The fact that there was a lapse of time between the issuance of the warrant on October 15, 1958, and the defendant's arrest on March 9, 1959, in no way detracts from the validity of the warrant; *U. S. v. Joines*, 258 F. 2d 471 (cert. den. 79 S. Ct. 118). The lapse in time was due to the fact that the investigation was continuing, as other persons were involved. The narcotics agents went to DiBella's home on March 9, 1959, to arrest him. Before any search could be made, the defendant DiBella voluntarily revealed the fact that he had narcotics and showed the agents where they were hidden in the apartment. The defendant's claim that the primary purpose of the agents in entering the apartment was to search rather than to arrest is plainly without merit. As the arrest warrant was valid, the arrest was a legal arrest and the seizure was made incidental to a lawful arrest.

THE MOTION TO SUPPRESS MAY PROPERLY
BE DEFERRED UNTIL THE TIME OF TRIAL.

A motion to suppress made before the return of the indictment, as here, is generally regarded as an independent proceeding. As such, any final decision on the motion is regarded as a final order and an appeal from that decision may be taken. *U. S. v. Poller*, 43 F. 2d 911 (2d Cir. 1930). (58) The Courts have recognized the fact that as a result of this principle it is possible for prosecution to be delayed for months or years while the appeals on such motions are pending. In addition, the holding of a hearing on the motion to suppress, in effect litigates the same ground to be covered, although on different issues, as that at the time

Affidavit of Charles L. Stewart

of the trial. To avoid such delays, and to avoid a multiplicity of appeals and trials, while at the same time preserving to the defendant all the constitutional rights to which he is entitled, the Courts have frequently denied such motions, with the express right reserved to the defendant to renew the motion at the time of trial.

Such was the case in *U. S. v. Adelman*, 107 F. 2d 497 (2d Cir. 1939), a case arising in the United States District Court for the Eastern District of New York. There, the defendant made a motion to suppress certain narcotics seized in the search of the defendant's apartment. There the motion was made prior to the filing of the indictment. The District Court ruled that as there was a conflicting issue of fact presented in the affidavits as to whether the defendant consented to the search, this issue could be resolved at the time of trial. The Court thereupon denied the motion, with leave to the defendant to renew the motion at the time of trial. This procedure was approved by the Court of Appeals. The Court stated that "certainly it was within Judge Byers' discretion to decide that oral testimony was necessary and to leave decision to the trial judge" *U. S. v. Adelman*, supra, p. 499.

(59) A recent extensive review of the law as to whether an appeal will lie on a motion to suppress made prior to and after indictment was set forth in *Rodgers v. U. S.*, 158 F. Supp. 670 (S. D. Cal. 1958). In discussing the law, the Court stated at page 675:

"If the motion is filed and the order entered *before* indictment returned, then the order is usually held to be final and independently appealable. . . . Citing cases.

When the motion is *filed after*, and the *ruling made after* the return of the indictment, the order is inter-

Affidavit of Charles L. Stewart

locutory and not independently reviewable. . . . Citing cases.

But where motions are made *before* indictment and *ruled on thereafter*, the cases are in conflict. One line of cases holds the orders final and independently appealable. . . . Citing cases. while another line of cases hold the order interlocutory and not independently appealable. . . . Citing cases."

On appeal, the District Court's decision was affirmed by the 9th Circuit, *Rodgers v. U. S.*, 267 F. 2d 79 (9th Cir. 1959).

But the problem of the appealability of the order would not arise, when the order is one denying the defendant's motion, with the right to renew it at the time of trial. Such an order would be plainly interlocutory. Rule 41(c) of the Federal Rules of Criminal Procedure states in part:

"The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

The recent decision in *Leiser v. U. S.*, 16 F.R.D. 199 (D. Mass. 1954) is in point here. There the District Court continued the motion to suppress until trial, even though (60) the defendant claimed he would be thereby prejudiced. Similar results were reached in *U. S. v. Nelson*, 208 F. 2d 505 (D.C. Cir. 1953) cert. den. 346 U. S. 827, and *U. S. v. Williams*, 227 F. 2d 149 (4th Cir. 1955).

The source of your deponent's information and grounds for his belief as to the facts of the defendant's arrest set forth above, are the statements to your deponent by Agents

Affidavit of Charles L. Stewart

David W. Costa and the other narcotics agents who arrested in the defendant DiBella on March 9, 1959.

WHEREFORE, your deponent respectfully prays that the defendant DiBella's motion to suppress the evidence seized at the time of his arrest on March 9, 1959, be denied without prejudice to the defendant's right to renew the motion at the time of trial, or in the alternative, that a hearing be ordered to determine the question as to whether the arresting agent had probable cause to arrest DiBella on March 9, 1959, and whether the seizure of narcotics and money was a lawful seizure.

(Sworn to by Charles L. Stewart on September 10, 1959.)

Appendix "A" Annexed to Affidavit of Charles L. Stewart

(63)

[WARRANT TO APPREHEND]**Cr. 45902****Comm. Docket #1****Case 5**

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO ANY SPECIAL AGENT, BUREAU OF NARCOTICS, and/or To the Marshal of the United States for the Eastern District of New York and to his Deputies or any or either of them—GREETING:

WHEREAS, complaint on oath hath been made to me, charging that

MARIO DI BELLA

did on or about the 10th day of September, in the year one thousand nine hundred and fifty-eight, at the Eastern District of New York, in violation of Section 4704(a), Title 26 and Title 18 U. S. C. Sec. 2 unlawfully sell, dispense and distribute a narcotic drug, to wit: one ounce of heroin hydrochloride, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law as more fully set forth in the complaint this day filed in my office, a certified copy of which is hereto attached, against the peace of the United States and their dignity, and against the form of the statute of the United States in such case made and provided.

NOW, THEREFORE, YOU ARE COMMANDED, in the name of the President of the United States of America, to apprehend the said MARIO DI BELLA and bring his body forthwith be-

Appendix "A" Annexed to Affidavit of Charles L. Stewart

fore me, or some judge of the United States, wherever in the Eastern District of New York he may be found that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 6th day of October in the year of our Lord one thousand nine hundred and fifty-eight.

(Signature illegible)

United States Commissioner
of the Eastern District of New York.

APPROVED:

CORNELIUS W. WICKERSHAM, JR., CCS
United States Attorney
of the Eastern District of New York.

(64)

[RETURN]

Received this WARRANT on the 6th day of October, 1958 at Brooklyn, New York, and executed the same by arresting the within-named

MARIO DI BELLA

at Brooklyn, New York, on the 9 day of March, 1959, and have his body now in court, as within I am commanded.

DAVID W. COSTA
Narcotic Agent

Appendix "A" Annexed to Affidavit of Charles L. Stewart

(65)

[FINAL COMMITMENT]

Pol. Officer

Agent DAVID W. COSTA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Time 11 30 AM

THE UNITED STATES

VS

MARIO DI BELLA

35-15—80 St Jackson Heights NY
Queens

Age 52 White U.S.

Charged with violation U.S.C.

Title 26 & Title 18 USC Sec 2

Section 4704(a)

Sept 10 1958.

Defendant duly arraigned before me March 10 1959, and, after, having been informed of the charge against him/her and his/her rights to aid of counsel, waived examination, it is

ORDERED that said defendant be held to answer to the charge and any order of the court and that bail be fixed in the sum of \$10,000— and that he/she be committed to the custody

Appendix "A" Annexed to Affidavit of Charles L. Stewart

of the United States Marshal for the Eastern District of New York, and by said Marshal duly committed to the custody of the United States Detention Headquarters, 427-431 West Street, in the Borough of Manhattan, City of New York, until such bail is given.

Dated, Brooklyn, N. Y., March 10 1959.

(Signature illegible)

United States Commissioner for the
Eastern District of New York.

Defendant having given bail, it is ordered that be
released from custody.

Dated, Brooklyn, N. Y., March 10 1959.

(Signature illegible)

United States Commissioner for the
Eastern District of New York.

Appendix "B" Annexed to Affidavit of Charles L. Stewart**[AFFIDAVIT OF DAVID W. COSTA]**

(68) **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

EASTERN DISTRICT OF NEW YORK, ss.:

DAVID W. COSTA being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with Daniel D. Moynihan, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale not from the original stamped packages and not pursuant to any written order form in violation of the provisions of the Internal Revenue Tax Laws.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Appendix "B" Annexed to Affidavit of Charles L. Stewart

Upon information and belief, Mario DiBella rents apartment #42 at 35-15 80th Street, Jackson Heights, Queens, New York.

(69) At 7:30 A.M. on August 26, 1958, I observed Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, Long Island, New York. DiBella walked to the street and entered his Chrysler automobile New York License No. 6971NE. DiBella drove to 37th Avenue and 79th Street, Jackson Heights, where he met one Sammy Panzarella, who entered the Chrysler automobile driven by DiBella. The two men drove to Roosevelt Avenue and 79th Street where Panzarella left the car. I observed Panzarella walk to 78th Street, where, upon meeting Agent Moynihan, Panzarella handed a small envelope to him. Later tests showed that this envelope contained heroin hydrochloride.

A second purchase of heroin from Panzarella was arranged by Agent Moynihan to be effected September 10, 1958.

At 11:00 P.M. September 10, 1958, I observed Mario DiBella leave Apartment #42 at 35-15 80th Street, Jackson Heights, New York and walk to Roosevelt Avenue and 74th Street where he met Panzarella. DiBella and Panzarella then walked to 76th Street near Roosevelt Avenue, where they parted company. Panzarella then met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he claimed he had obtained from DiBella.

Upon information and belief, Mario DiBella has been a source of supply of heroin hydrochloride to Samuel Panzarella over a period of years; that on each of the two occasions described above, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York and proceeded directly to meet Samuel Panzarella; that Samuel

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Panzarella (70) then proceeded directly to Agent Moynihan and sold him a quantity of heroin hydrochloride.

That the source of your deponent's information and the grounds for his belief are the investigation and reports of Agents of the Bureau of Narcotics; the statements of Samuel Panzarella and other witnesses and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David W. Costa on October 6, 1958.)

Appendix "C" Annexed to Affidavit of Charles L. Stewart**[AFFIDAVIT OF DANIEL D. MOYNIHAN]****(72) UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

EASTERN DISTRICT OF NEW YORK, ss:

DANIEL D. MOYNIHAN being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with David W. Costa, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely; heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale and that these drugs are not from the original stamped packages and not pursuant to any written order form, in violation of the provisions of the Internal Revenue Tax Laws.

Appendix "C" Annexed to Affidavit of Charles L. Stewart

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

Your deponent met one Samuel Panzarella who offered to sell heroin to your deponent. At the time of the meeting, Samuel Panzarella and your deponent agreed to effect the sale of heroin to your deponent, this sale to be made on August 26, (73) 1958 at 8 o'clock in the morning. At six o'clock in the morning on August 26, 1958, your deponent met Samuel Panzarella in Manhattan. Samuel Panzarella stated that he wished to telephone his source of supply of heroin, and he thereupon made a telephone call. After the telephone call was completed, Samuel Panzarella stated to your deponent that delivery of the heroin would be made to your deponent at 8:30 A.M. that morning.

Your deponent then drove with Samuel Panzarella to Jackson Heights, Long Island and parked on 79th Street, north of Roosevelt Avenue. Samuel Panzarella left the vehicle at about 7:30 A.M. that morning and your deponent observed him walk to 79th Street and 37th Avenue and enter a green Chrysler, New York license #6971 NE. Your deponent observed Samuel Panzarella leave that Chrysler several minutes later at 79th Street and Roosevelt Avenue. Samuel Panzarella then returned to the vehicle used by your deponent, and at 8:05 A.M. that morning Samuel Panzarella handed your deponent a glassine envelope containing a white powder which subsequent tests proved to be an ounce of heroin hydrochloride.

A similar pattern of events followed on September 10, 1958. At 9:30 in the evening of September 10, 1958, Samuel Panzarella and your deponent met in Manhattan, where Samuel Panzarella offered to sell your deponent another ounce of heroin. Samuel Panzarella stated that it would again be necessary to go to Jackson Heights to meet his

Appendix "C" Annexed to Affidavit of Charles L. Stewart

"connection", (74) and that he would telephone his "connection". Panzarella then made a telephone call at 9:40 P.M. on September 10, 1958. Your deponent and Samuel Panzarella went to 74th Street and Roosevelt Avenue, Jackson Heights, Long Island, New York. At 11:05 P.M. Samuel Panzarella left your deponent. Your deponent observed him meet Mario DiBella a few minutes later, and saw Mario DiBella walk with Samuel Panzarella from 74th Street to 37th Road. Samuel Panzarella returned to your deponent at 11:20 P.M. and your deponent and Samuel Panzarella then drove to New York City. Enroute, Samuel Panzarella handed a glassine envelope containing a white powder to your deponent, which powder was tested and found to be heroin hydrochloride.

Samuel Panzarella stated that DiBella was his source of supply of heroin and that DiBella had supplied the heroin sold to your deponent on September 10, 1958 and August 26, 1958.

No tax stamps were seen by your deponent on either of the glassine envelopes received from Samuel Panzarella on September 10, or August 26, 1958, nor was the sale of these two packages pursuant to a written order form.

Upon information and belief, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York on each of the two occasions described above and met Samuel Panzarella directly thereafter; that Samuel Panzarella then directly proceeded to meet your deponent and the sale of heroin was effected: that Mario DiBella (75) has been a source of supply of illegal heroin hydrochloride for an extended period.

That the source of your deponent's information and the grounds for his belief are the statements made by Samuel

Appendix "C" Annexed to Affidavit of Charles L. Stewart

Panzarella, the observations and investigation of other narcotic agents and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David D. Moynihan on October 6, 1958.)

**Reply Affidavit of Jerome Lewis Read in
Support of Motion**

(76) UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

JEROME LEWIS, being duly sworn deposes and says:

I am the attorney for the petitioner herein.

This affidavit is submitted in reply to the opposing affidavit of the government.

Deponent respectfully submits that the government's opposing affidavit does not create any issues of fact for this Court to consider. The affidavit is made by Assistant United States Attorney Charles L. Stewart and the allegations contained therein are not based upon his own personal knowledge. On page 13 of the said affidavit, Mr. Stewart alleges:

"The source of your deponent's information and grounds for his belief as to the facts of the defendant's arrest set forth above, are the statements to your deponent by Agents David W. Costa and the other narcotics agents who arrested the defendant DiBella on March 9, 1959".

While it is a moot question whether hearsay evidence may be used solely for the purpose of obtaining a warrant as indicated by the Supreme Court in *Giordenello v. U. S.*, 357 U. S. 480, wherein the Court said (p. 485):

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“But we need not decide whether a warrant may be issued solely on hearsay information”,

never has it been held that on the trial of an action or on a hearing as we have in the present application, that a government prosecutor may testify or submit a sworn affidavit as to facts of which he had no personal (77) knowledge, but facts which were allegedly told to him by a government agent.

The affidavits of Agents Costa and Moynihan sworn to on October 6, 1958, five months prior to the arrest of the petitioner certainly have no relevancy as to what transpired on the night of the arrest nor should be considered on the question of the validity of the complaint upon which the warrant of arrest was issued, for these affidavits were not presented to United States Commissioner Epstein.

The opposing affidavit sets forth a summary of facts as to what occurred on March 9, 1959, in the petitioner's apartment (pgs. 2, 3).

These facts are not the result of the prosecutor's own knowledge or information, they are purely hearsay.

Deponent has not submitted counter-affidavits from Jeanne Di Bella and Mario Di Bella for it is deponent's contention that the allegations in the opposing affidavit as to the events of March 9, 1959, should not be considered by this Court for they are inadmissible.

Deponent has conferred with both Miss Di Bella and Mr. Di Bella and was told by Miss Di Bella that on March 9, 1959, the upstairs bell rang and she opened the apartment door. A man showed her a badge and he and several other men walked into the apartment. They walked right into the living room which is adjacent to the hall corridor where her father was seated.

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Mr. Di Bella informed deponent that the agents came over to him and said they were narcotics agents. They showed him a warrant and said he was under arrest and not to leave the apartment. About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents.

The statements given to deponent by Miss Di Bella and the petitioner are no more admissible in evidence than the statements of the narcotic agents to government counsel. Neither should be given any consideration by this Court. They present no issues of fact.

The issues before this Court are purely one of law: (78)

1. Was the warrant of arrest issued on October 6, 1958, invalid because the complaint upon which it was issued failed to state facts sufficient to spell out probable cause?
2. Was the warrant of arrest used as a pretext to make an exploratory search of petitioner's apartment?
3. Was the warrant of arrest invalid in that it was issued on October 6, 1958 and the complaint executed on October 15, 1958?

Deponent will discuss these issues seriatim.

a. The complaint of Agent Costa upon which the warrant was allegedly issued is wholly devoid of any facts. The allegations are based upon information and belief. There was nothing in the complaint upon which the Commissioner could predicate a finding of probable cause. At the oral

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argument of this motion, the Court quickly realized this situation for the Court asked government counsel the following (pgs. 30, 34 of the hearing minutes):

The Court: Were these facts or any of them officially brought to the attention of Commissioner Epstein at the time a warrant was issued?

Mr. Stewart: You mean verbally?

The Court: You said officially, apparently they weren't in the affidavit because Mr. Lewis says they were not.

Were they questioned by the Commissioner?

Was any of this information brought to the attention of the Commissioner, Commissioner Epstein, so that they may have been considered by him in satisfying himself that there was probable cause?

Mr. Stewart: I would have to check on that. I don't recall.

There was some discussion whether it covered the probable cause question or not, I cannot say. I know there was a discussion as to the need for secrecy in the issuing of the warrant, and the reasons for that I believe were given.

I would have to check with the agents who were present at that time. Of course, the search warrant was sought and the search warrant application was denied.

The Court: Then using the arrest for a basis for making a search of the premises? (p. 35)

The Court: Incidentally, are any of the details to which you referred contained in the affidavit which was submitted in support of (79) the application for the warrant?

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Mr. Stewart: Those details were not, but they were brought before the Commissioner in the Government's application for a search warrant.

Mr. Lewis: Your Honor, I am sorry to interrupt, but there were two different commissioners involved here, so the facts couldn't have been brought before Commissioner Epstein.

The Court: You said that.

You told me that Commissioner Abruzzo had denied the application for a warrant.

Mr. Stewart: That is right, sir.

He denied it (page 31, minutes).

The opposing affidavit is strangely silent as to the Court's inquiry. Mr. Stewart's affidavit does not answer the Court's question. Affidavits have not been submitted by narcotic agents nor an affidavit from Commissioner Epstein as to whether he made such an inquiry. The conclusion is inescapable that no such inquiry was made by Commissioner Epstein.

The cases are legion in holding that when a complaint for a warrant is presented to a Commissioner based upon information and belief, it is the duty of the Commissioner to make inquiry of the complainant as to the sources of his information and the grounds of his belief so as to enable the Commissioner to determine in his own mind whether there is probable cause to believe that an offense has been committed.

De Hardit v. U. S., 224 F. 2d 673

U. S. v. Dolan, 113 F. Supp. 757, 761

U. S. v. McCunn, 40 F. 2d 295

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Matter of Rule of Court, C.C. Ga. 1877, 3 Woods,
U. S. 502, 20 Fed. Cases No. 12,126

In *Giordenello v. U. S.*, 357 U. S. 480, the Supreme Court said (p. 486):

"No warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the person or things to be seized, of course applies to arrest as well as search warrants. The purpose of a complaint is to enable the Commissioner to determine whether the probable cause required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the (80) complainant's mere conclusion that the person whose arrest is sought has committed a crime."

Rules 3 and 4 of the Federal Rules of Criminal Procedure must be read in light of the constitutional requirements (4th Amend.) they implement. Under Rules 3 and 4, *supra*, a complaint presented to a Commissioner for the issuance of a warrant must set forth facts with definiteness from which the existence of probable cause can be determined.

U. S. v. Young, 14 F.R.D. 406

Reffer v. U. S., 178 F. 24

Veeder v. U. S., 252 F. 414

U. S. v. Lassiff, 147 F. Supp. 944

U. S. v. Castle, 138 F. Supp. 436

U. S. ex rel. King v. Gokey, 32 F. 2d 793

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Nathanson v. U. S., 290 U. S. 41

U. S. v. Freeman, 165 F. Supp. 121

U. S. v. Lester, 21 F.R.D. 376

In *Giles v. U. S.*, 284 F. 208, 214, the Court made this very cogent observation:

"In this case, as no facts whatever were put before the Commissioner, he was evicted from his judicial function, and remitted to a performance purely regulatory. The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer serving the writ. This is a very dangerous amalgamation of powers."

In the instant case, Agent Costa was the applicant, affiant and the officer serving the warrant. To sustain the validity of the said warrant would in effect make Agent Costa, the judge of the existence of probable cause. This would be a very dangerous amalgamation of powers.

The Government realizing that the warrant obtained on October 6, 1958, was invalid because it was obtained upon a complaint that was defective, now makes the belated assertion that even if the warrant is invalid, that Agent Costa had probable cause to arrest Di Bella at any time after September 10, 1958, with or without a warrant, citing 26 U.S.C.A. Sec. 7607 (p. 10 opp. aff.).

(81) During the course of the oral argument of this application, this Court asked Mr. Stewart (p. 39, minutes):

"The Court: If he had enough knowledge justifying arrest why did he need a warrant?

Mr. Stewart: He didn't need a warrant in this case.

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The only reason that it was given to him because he asked for one as a matter of bureau policy. * * *

I am very sorry that the warrant was ever issued, but it is too late."

On October 6, 1958, the Government appeared before Commissioner Abruzzo and made an application for a warrant to search the apartment of Di Bella. Commissioner Abruzzo after reading the affidavits of Agents Costa and Moynihan (App. B and C, Opp. Aff.) denied the application (Ex. A attached hereto), undoubtedly, on the ground of the lack of probable cause. When the Government saw that its application for a search warrant had been denied, it decided not to submit Costa's complaint for the issuance of an arrest warrant. A scrutiny of the said complaint reveals that it was originally dated October 6, 1958, and that thereafter the "6" was changed to "15th".

A warrant for the arrest was issued by Commissioner Epstein on October 6th, 1958. In fact, two warrants were issued, one for Di Bella, the other for Panzarella. If Costa believed that he had reasonable grounds to arrest Di Bella on October 6th, 1958, without the necessity of obtaining a warrant, he would have proceeded to do so. It is significant to note that in the opposing affidavit, Mr. Stewart does not repeat the statement made on the oral argument that it is a matter of bureau policy to obtain a warrant.

The Government admits that Agent Costa was in possession of the warrant of arrest when he and other agents went to Di Bella's apartment on March 9th, 1959, at 8:15 P.M.; that Di Bella was arrested pursuant to the said warrant which was exhibited to Di Bella (pgs. 2, 3, opp. aff.). The return of the warrant states as follows:

*Reply Affidavit of Jerome Lewis***"RETURN**

"Received this warrant on the 6th day of October, 1958 at Brooklyn, New York, and executed the same by arresting the within-named Mario Di Bella (82) at Brooklyn, New York, on the 9 day of March, 1959, and have his body now in court, as within I am commanded.

DAVID W. COSTA
per Narcotic Agent (Ex. B attached hereto)"

The Government utilized the warrant to make the arrest. Based upon the said arrest, the Government agents then proceeded to search the apartment. In effect, the argument advanced that Agent Costa had probable cause to arrest Di Bella without a warrant (p. 10 opp. aff.) is abandoned by the Government for the following statement appears on page 10 of the opposing affidavit:

"As the arrest warrant was valid, the arrest was a legal arrest and the seizure was made incidental to a lawful arrest."

No affidavit from any narcotic agent has been submitted in the opposing papers to justify the existence of probable cause for the arrest of Di Bella on March 9, 1959. Certainly, affidavits made by agents on October 6, 1958 and the date later changed to October 15th on the complaint of Costa, cannot be considered on this present motion to suppress. The affidavits dated October 6, 1958 were used in an endeavor to obtain a search warrant, which was denied by Commissioner Abruzzo. The Government should not be permitted to resurrect these affidavits approximately one year later to justify the existence of probable cause on an

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arrest made five months after the application for a search warrant.

As was said by the Court of Appeals in this Circuit, speaking through Moore, J. in *U. S. v. Volkell*, 251 F. 2d 333, 336:

“The scope of the word reasonable in 26 USCA, Sec. 7607 (2) must be construed in relation to the safeguards granted in the Fourth Amendment to the Constitution against unreasonable searched and seizures.”

The facts and circumstances in the instant matter indicate beyond any peradventure of doubt that the warrant of arrest issued on October 6, 1958 was the medium whereby Di Bella was arrested and that the search of Di Bella's apartment was conducted as an incident to that arrest. This allegation is admitted by government counsel and is his chief argument in opposition to the motion to suppress (p. 10 opp. aff.).

(83) In *Jones v. U. S.*, 357 U. S. 493, the Supreme Court stated that it is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling house cannot of itself justify a search without a warrant. On page 500, the Court said:

“The Criminal Rules specifically deal with searches of this character by restricting nighttime warrants to situations where the affidavit upon which they are issued are positive that the property is in the place to be searched.”

“This Rule is hardly compatible with a principle that a search without a warrant can be based merely upon probable cause.”

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The search of Di Bella's apartment was made in the nighttime.

In *U. S. v. Rabinowitz*, 339 U. S. 56, the agents executed a valid warrant of arrest prior to their search, which they had previously obtained for the defendant's arrest. The court stressed that the legality of the search was entirely dependent upon an initial valid arrest.

In the instant matter, the search was made in the nighttime. The agents did not obtain a search warrant. A previous application for a search warrant had been denied. Since the search was dependent upon the validity of the arrest and since the warrant of arrest was invalid, it follows the night the day, that the search was illegal.

In *Giordenello v. U. S.*, *supra*, the Court said on page 481:

"The Government recognizes that since Finley had no search warrant, the heroin was admissible in evidence only if its seizure was incident to a lawful arrest." (citing *U. S. v. Rabinowitz*, *supra*)

In the above case, the Supreme Court found that the complaint upon which the warrant was issued was defective in that it did not set forth facts sufficient to spell out probable cause. The court found that the warrant should not have been issued; that the seizure was illegal and that the seized narcotics should not have been admitted in evidence.

The cases cited by the Government to sustain its position are proof positive that petitioner's application should be granted.

(84) In *Giordenello v. U. S.*, *supra*, the Court said (p. 486):

"The purpose of a complaint is to enable the Commissioner to determine whether the probable cause

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required to support a warrant exists. *The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. * * ** (emphasis added)

In the present application, there were no facts presented to the Commissioner to justify the issuance of a warrant.

The Government contends that the complainant's probable cause was based on both his personal knowledge and hearsay information. However, in the complaint nothing is set forth to indicate to the Commissioner what the agent's personal knowledge was and what the hearsay information consisted of. Mere conclusions cannot take the place of facts.

In *U. S. v. Freeman*, 165 F. Supp. 121, the affiant had personal knowledge and was possessed of the essential facts to be present in the complaint to show probable cause, but the complaint failed to set forth these facts and the court found that the warrant for the arrest of the defendant was illegal.

The Government states that the affidavits of Agents Costa and Moynihan in support of the application for a search warrant were on file with the United States Commissioner's office. This is an erroneous statement of fact because upon denial of the application of the Government for a search warrant, the Commissioner forwards the papers to the Clerk's office. The said application for a search warrant was made before Commissioner Abruzzo. The application for the warrant of arrest was made before Commissioner Epstein. Commissioner Epstein never saw these affidavits for they were not in his office at the time of the application nor did the Government present the affidavits to him.

Draper v. United States, 358 U. S. 307 concerned itself

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with the question whether the government agent's knowledge of the facts related to him by an informant who was a special employee of the Bureau of Narcotics spelled out probable cause. A very detailed statement of facts was given by the informer to the agent. The agent verified these facts. When defendant alighted from a train and proceeded to walk at a very fast pace towards the station exit, the agent arrested (85) him. If the agent had not made an immediate arrest, his quarry would have flown and the agent would have been derelict in his duty.

In the present application, there were no special circumstances confronting the agents as in the Draper case. They knew where the petitioner resided. There was no reason to suspect that he would flee. The fact is that five months after the issuance of the warrant, he was arrested in his home.

Moreover, in the Draper case the information was given directly to the Agent by a reliable informant.

In the instant case, Costa never spoke to the informant. Whatever information he received may have been told to him by agent Moynihan. While under certain circumstances where the exigencies of time create a situation where immediate action is imperative, hearsay evidence is admissible, never have our courts extended the doctrine that hearsay upon hearsay is permissible. What Moynihan was told by Panzarella was hearsay to Moynihan. What Moynihan told Costa was then a double hearsay.

In *U. S. v. Lassoff*, 147 F. Supp. 944, 948 the Court said:

"A warrant cannot issue by placing an inference upon an inference as it is well established that the basis of a presumption must be fact and not another presumption."

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However, even if Moynihan related to Costa what he had been told by Panzarella, the substance of such conversation was not set forth in Costa's complaint. The opposing papers contain only an affidavit of government counsel and his conversations with Costa would be hearsay upon hearsay upon hearsay.

The suggestion to this Court by the Government that the motion to suppress be deferred until the time of trial is indicative of the weakness of their argument.

Evidence received by an unlawful search and seizure may be suppressed on an application before indictment. A final decision on the motion is considered a final order and an appeal may be directly taken.

Application of Fried, 68 F. Supp. 961

Perlman v. U. S., 247 U. S. 7

U. S. v. Poller, 2 Cir. 43 F. 2d 911

(86) The prosecutor sets forth in his affidavit a harrowing description of what might happen if this motion was not denied without prejudice to a renewal at the time of trial.

Deponent is amazed at the temerity of the prosecutor to insinuate that this application was made for the purpose of delay. Any and all delays in the determination of this application has been as the result of the procrastination and dilatory tactics of government counsel. Let's look at the record:

Motion papers were served on the government on or about June 17, 1959 returnable July 6th. On July 6th, deponent was in court prepared to argue the motion. Mr. Stewart argued loud and long for an adjournment and over deponent's strenuous objection, Judge Inch granted the

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government's request and adjourned the motion to August 3rd. On August 3rd, before Judge Zavatt, the Government once again requested an adjournment to August 24th. On August 24th, the motion was put down for argument on August 25th. The motion was argued on August 25th. Mr. Stewart presented no papers on the argument and asked for time to reply to deponent's memorandum. The Court granted Mr. Stewart's request and told him to have his papers in by September 8th. Prior to September 8th, Mr. Stewart requested that the Court give him additional time to file his papers and his time was extended to September 11th.

Petitioner pleaded to the indictment found against him on July 14th. If it were not for the government's insistence that the motion be adjourned on July 6th, the motion most likely would have been decided prior to the pleading to the indictment. The Government cannot profit by its delaying tactics then cite cases in support of their alleged contention that to litigate the issue of suppression would result in a delay of the prosecution of the case. This application is one of law. A formal hearing to take testimony is not needed. No affidavits were presented by the agents which created issues of fact. The statement of the prosecutor that the source of his information and grounds of his belief as to the facts are the statements of Agent Costa and other narcotics agents made to him is hearsay and cannot be considered as evidence to create factual issues.

(87) It is deponent's further contention that this application should be granted because the warrant of arrest was used as a pretext to make an exploratory search of petitioner's apartment.

The warrant of arrest was issued on October 6, 1958. It

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was not executed until March 9, 1959. Government's papers in opposition (page 10) state that the lapse of time was due to the fact that the investigation was continuing as other persons were also involved, cannot be considered by this court. This is a hearsay statement of the prosecutor. No reason is advanced why the agent's who allegedly made this statement did not submit an affidavit to that effect. An affidavit based upon information and belief has never been countenanced by our courts. Assuming *arguendo*, that this court consider this hearsay allegation, nevertheless, the facts belie this assertion.

On October 6, 1958, the Government applies for a search warrant of petitioner's apartment. If the warrant had been granted and a search made whether successful or not, both petitioner and others alleged to be involved would have been immediately put on notice. Common sense dictates that this is no way to conduct an investigation if the purpose is to apprehend other persons acting in concert with petitioner.

There are no reasons advanced to this court why on March 9, 1959, agents arrested petitioner and then proceeded to search his apartment.

The fact that narcotics were found in petitioner's apartment on March 9, 1959 does not justify the use of a warrant as a pretext to make a search.

An invalid search is not made lawful by what it brings to light.

U. S. v. Spalino, 21 F. 2d 567

U. S. v. Glasser, 270 F. 818

U. S. v. Costanzo, 13 F. 2d 259

Garshe v. U. S. 1 F. 2d 620

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As was said by Judge McAllister in *Worthington v. U. S.*, 166 F. 2d 566,

"all the circumstances disclose that the arrest was made as a pretext to search for evidence, and on that ground alone, the evidence should have been suppressed."

(88) In *Henderson v. U. S.*, 12 F. 2d 528, 531, the court stated:

"And when it appears as it does here, that the search and not the arrest was the real object of the officers in entering the premises, and that the arrest was a pretext for or at most an incident of the search, ought such search be upheld as a reasonable one within the meaning of the constitution? Manifestly not."

See:

U. S. v. Lefkowitz, 285 U. S. 452

Deponent's further contention that the warrant of arrest is invalid is predicated upon the court records. The warrant of arrest is dated October 6, 1958. It was granted by Commissioner Epstein on October 6, 1958. The complaint is dated October 15, 1958. The return of the warrant dated March 9, 1959 states that Agent Costa received the warrant of arrest on October 6, 1958.

A warrant must be based upon a complaint containing sufficient facts to spell out probable cause. The complaint in this matter is dated nine days after the issuance of the warrant. The statement of government counsel that the U. S. Commissioner changed the date on the complaint from October 6th to October 15th but did not do so on the war-

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rant is not based on his own knowledge but is pure speculation. Neither an affidavit of the Commissioner or of any agent is submitted to substantiate this statement (p. 2, opp. aff.).

Deponent calls to the attention of this Court that under the word approved on the warrant there appears the name of the United States Attorney and the initials of Mr. Stewart. It therefore appears that both Mr. Stewart and Commissioner Epstein obviously saw the date October 6th and if it was an error either one would have changed it. It seems unlikely that two people could have made the same mistake.

There is a presumption of the regularity of court records. This presumption has not been rebutted.

As a conclusive reason why this application should be granted, deponent cites the case of *Latham v. U. S.*, 259 F. 2d 393, cited in the opposing affidavit:

(89) In *Latham v. U. S.*, supra, the government agent did the following:

- a. formulated all the plans of the investigation.
- b. accompanied the agents on each trip to the defendant's drug store.
- c. participated in the illegal sales.
- d. provided the marked money.
- e. instructed the agents what to do.
- f. stood just outside the window of the drug store and observed the negotiations with defendant.
- g. Saw one of the agents pay defendant money and receive morphine in return.

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h. Followed the purchaser of the morphine from the drug store and took the morphine in custody.

Under such statement of facts, the complaint of this government agent could in nowise be deemed hearsay.

The court held:

“Here, it is clear that Slotnick (agent) had personal knowledge, based his charge on knowledge, not belief, and that the complaint is an affirmative statement, from an affiant with personal knowledge.”

In the instant application, agent Costa had no personal dealings with Panzarella. He played a minor part in the proceedings except for a surveillance.

Unlike the Latham case, Costa's complaint was based on information and belief. In Latham, the agent set forth his observations in an affirmative statement based upon personal knowledge. The facts spelled out in the complaint were more than sufficient to show probable cause.

In our case, there were no facts spelled out in the complaint to enable the Commissioner to find probable cause.

It is respectfully submitted that the application to suppress should be granted.

(Sworn to by Jerome Lewis on September 14, 1959.)

Exhibit A Annexed to Reply Affidavit of Jerome Lewis

(90) **UNITED STATES DISTRICT COURT**

**FOR THE
EASTERN DISTRICT OF NEW YORK**

**Commissioner's Docket No. 2
Case No. 110**

UNITED STATES OF AMERICA,

—v.—

**MARIO DiBELLA and SAMUEL PANZARELLI,
Defendants.**

SEARCH WARRANT

To Hon. Salvatore T. Abruzzo, United States Commissioner, EDNY

Affidavit having been made before me by DAVID W. COSTA and DANIEL D. MOYNIHAN Agents of the Bureau of Narcotics, District No. 2 that they have reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, Long Island, New York in the Eastern District of New York there is now being concealed certain property, namely heroin hydrochloride, a devivative of opium and the grounds for the issuance of this warrant are set forth fully in the attached affidavits of Narcotic Agents David W. Costa and Daniel D. Moynihan, of the Federal Narcotic Bureau and as I am satisfied that there is probable

Exhibit A Annexed to Reply Affidavit of Jerome Lewis

cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

Your are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 6th day of October , 1958.

Denied 10/6/58

U. S. Commissioner.

Minutes of Hearing

(1) **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Brooklyn, New York,
August 25, 1959.

Before:

HONORABLE LEO F. RAYFIEL,

U. S. D. J.

Appearances:

JEROME LEWIS, Esq.,
Attorney for Petitioner.

CORNELIUS W. WICKERSHAM, JR., Esq.,
*United States Attorney for the
Eastern District of New York,*

By: CHARLES STEWART, Esq.,
Assistant United States Attorney.

MICHAEL J. MIELE
Official Court Reporter

(2) Mr. Lewis: May it please your Honor, this is an application to suppress evidence seized by the Government on March 10th, 1959, on the grounds that the warrant of arrest which was issued to the Government was invalid be-

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cause the complaint upon which it was based was defective, did not contain sufficient facts, nor any facts to constitute probable cause; also on the grounds that the warrant of arrest used was merely used as a pretext to make an exploratory search of the petitioner's apartment; also on a further ground, on a technical ground, that the warrant which was issued on October 8th, 1958, was predicated upon a complaint which was executed on October 15th, 1958.

The Court: Give me those dates again, please.

You say the warrant was issued when?

Mr. Lewis: October 6th, 1958.

The complaint upon which the warrant is based is dated October 15th, 1958.

The Court: Do you have both papers there?

Mr. Lewis: Yes.

Briefly I will explain the facts to you as up here in the file.

On October 6th, 1958, the Government made an (3) application before United States Commissioner Abruzzo for a search warrant.

There are two affidavits attached, one by Agent Moynahan, and Agent Costa with a full exposition of the facts.

Commissioner Abruzzo so denied the search warrant.

The Court: Did he state the grounds?

Mr. Lewis: No, he just says, denied, October 6th, 1958, and we must presume that it was denied that there wasn't probable cause for the issuance of a search warrant.

Now, on October 6th, 1958, Commissioner Epstein issued a warrant of arrest.

The warrant of arrest states:

Whereas a complaint on oath has been made to me charging—

And then it sets forth the allegations to a crime—

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As more fully set forth in the complaint this day filed in my office a certified copy is hereto attached.

We look at the complaint, your Honor, and we find out that the complaint is dated October 15th, (4) 1958.

So on that ground alone, I contend that there was nothing before the Commissioner for him to issue a warrant of arrest because rules three and four of the Rules of Criminal Procedure and Article 4 of the Constitution distinctly state that a complaint must be exhibited to the Commissioner or to a magistrate showing probable cause in order for him to issue a warrant.

The Court: Hand it up to me, please.

Mr. Lewis: Yes.

I also wanted to call your Honor's attention to—

The Court: Just a moment, please.

Did you notice, of course, that the five in fifteen which is written in ink covers a six typewritten?

Mr. Lewis: That is right.

The Court: So that before this change was made, obviously it was a change, a five superimposed upon the type-written six.

They both were written on October 6th.

Mr. Lewis: Yes, but also all I can go is by what is on there.

(5) I also go by the return.

If you look on the back of the warrant, there is a return that shows that it was executed.

The return says, a warrant of arrest dated October 6th, and not October 15th.

Also looking at the records of Commissioner Schiffman, there is a notation in his records that the petitioner was arraigned before him on a warrant issued by Commissioner Epstein on October 6th, 1958.

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There is no complaint dated October 6th.

There might have been a date of October 6th at one time, but it is gone over and the only date that appears before us now is October 15th.

Now, your Honor, this application was made prior to the filing of the indictment, and of course, under our law it is permissible and therefore in cases of this sort it is not necessary, as sometimes the Court does, to deny an application without prejudice so that the trial Court could pass upon it because in matters of this kind it is appealable as a matter of right in the Court of Appeals.

I would like to discuss with your Honor the complaint in this case.

The complaint is made by Agent Costa and looking (6) in the affidavits which are on file in this Court, we find that Agent Costa was not the agent that was directly involved in the purchase of the narcotics because it was Agent Moynahan who says that on August 26th he purchased some narcotics from one Samuel Panzarella, and on September 10th that he purchased these drugs from Samuel Panzarella.

In his affidavit he also states that he had a conversation with Panzarella.

The petitioner was not present at the time of the sale.

Moynahan never spoke to the petitioner. All he says in his affidavit is that he saw Panzarella and the petitioner have conversations prior to the time of the sale, and they never saw anything passed between the two of them.

Now, Agent Costa testified in his affidavit or allegations in his affidavit that he saw Panzarella and the petitioner have conversations, and Panzarella going to the petitioner's automobile. He never saw anything passed.

He was not present at the actual sale and never had a conversation with Samuel Panzarella.

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So we find that instead of Moynahan, who is the (7) direct participant in these transactions, making the complaint, Agent Costa does.

The Court: Was there any accompanying affidavit by Moynihan?

Mr. Lewis: Nothing at all, that is one of the reasons that this is defective.

In looking at the complaint we find that Costa states upon information and belief there is no direct knowledge in this complaint, upon information and belief that the defendants, DiBella and Panzarella sold some drugs and the usual allegations of the statute.

Then he says that the source of his information and the grounds of his belief are deponent's personal observations in this case.

It doesn't tell us what the personal observations are.

Now, I am using their affidavit because it is not necessary to have a hearing in this case because we have all the evidence in the affidavit.

If we look at the affidavit which we don't have to consider because we are only bound on what appears in the complaint upon which the commissioner issued his warrant, he says: Deponent's personal (8) observations.

What were they?

Nobody knows them.

For the Commissioner to issue a warrant based upon this would be one based on conjecture, surmise and suspicion; but we do know when we look at the affidavit that all that the agent, Agent Costa, had was an observation that he saw the petitioner and Panzarella meet on two different occasions; Panzarella going to the petitioner's automobile, assumes they had a conversation, that Panzarella left and then later on Panzarella met with Agent Moynahan.

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I say to your Honor that—

The Court: All these various incidents you just referred to occur on the same day, in succession?

Mr. Lewis: Yes, sir; but they do not appear in the complaint and the Commissioner can only be bound upon what appears in the complaint.

I am giving the Government every benefit of doubt and showing you what appears in the complaint, that Costa, all he had was the people under surveillance. He never saw the petitioner give him (9) anything, never saw anything passed between the two of them; that in his own affidavit it shows that petitioner was not present at the time of the sale.

He never had a conversation with Panzarella.

The Court: Any statement of the background of those involved in it?

Mr. Lewis: No, your Honor.

Perhaps that is one of the reasons why Commissioner Abruzzo denied the application for a search warrant.

As to deponent's personal observations, that is merely conclusory in nature. It means nothing.

It says nothing and it doesn't have anything upon which the Commissioner could predicate a warrant upon.

Then it says the statement of Panzarella and we look at the affidavit and we know that he never got any statement from Panzarella but Agent Moynihan did and then we have to go back once again to the complaint.

What were the facts that were given to Agent Moynihan? It doesn't appear here.

What were the facts, what were the statements?

(10) Now, on what can the Commissioner predicate a warrant of arrest?

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Upon a conclusory allegation, statement of Samuel Panzarella?

Now, our law is wisely set, and an agent may be satisfied with what he says but the United States Commissioner is the one that must be satisfied because the agent could have all of the good faith in the world but that may not establish probable cause as a matter of law.

The Commissioner is the first judicial officer that passes upon an application and he must be satisfied by inquiry that there is probable cause and I say to your Honor looking at this right now, all we have got is a statement of Samuel Panzarella, without any facts, nothing to indicate what Samuel Panzarella said.

Now, in his affidavit Costa states that he was told by Moynahan what Panzarella said to him.

Now, in the Draper case, and I will come to that in a little while, there is an indication that hearsay evidence is permissible on an application for a warrant because you don't need the same quantum of proof in applying for a warrant as you (11) do in establishing guilt beyond a reasonable doubt; but our courts have never held that you can get a warrant based upon hearsay, upon hearsay.

It wasn't that the informant told Costa, but the informant told Moynahan then who told Costa and that is like an inference upon an inference, and certainly the law has never been extended to encompass a case like that.

In fact, the case I cite in my memorandum of law, United States against Lester, 21 F. R. D., 376, one agent by the name of Edwards had the knowledge to make the complaint.

He couldn't be in town at the time an application was made for this warrant, so he told it to a fellow agent, and that fellow agent made the application for the warrant, and the Court said: Since it was stipulated that Agent

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Sweeney who made the complaint to the United States Commissioner did so on information received and not on personal knowledge, I think that the arrest warrant is invalid.

Now, the last sentence says that the source—

The Court: Is this search made on the basis of the arrest you claim?

(12) Mr. Lewis: Yes.

The Court: Was the search made immediately after the arrest?

Mr. Lewis: Yes.

Definitely.

We will come to that.

I want to do it chronologically. This is a very important motion.

I have put in two months of research on this.

Then the officer says the source of the deponent's information and grounds of belief are otherwise in this case and record of the Bureau of Narcotics which means nothing, and it has been condemned time and time again by our courts, which state that an allegation to that effect conveys no information whatsoever.

Now, the law has been well settled, Judge, and when an agent states, and I have got one case here, the source of the deponent's information and grounds of his belief are an investigation conducted by him in the course of his official duties, Judge Rifkind of Southern District in granting the motion to suppress states:

"Such a complaint will not support a warrant (13) of arrest."

United States versus McCunn, 40 F. 2nd, 295, a Government agent swore to a complaint asking for the issuance of

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a warrant of arrest, alleging that the sources of his information and the grounds of his belief were official investigations made by the agent in his official capacity.

Judge Bondy in granting the motion to suppress said:

"To enable a committing magistrate to determine whether there is probable cause for the issuance of a warrant, the sources of the information and the grounds of the belief must be stated with sufficient definiteness to enable him to determine whether a warrant should issue.

"The warrant accordingly was issued without the establishment of probable cause and the arrest and search and seizure incidental thereto must be held to be illegal."

And he cited Judge Bradley, who was then sitting as a Circuit Court Judge who eventually became a Judge in the United States Supreme Court, and that case is the matter of *Rules of Court*, it is a rather famous case, and Judge Bradley said:

(14) "An affidavit made by an officer who, upon the relation of others, whose names are not disclosed, swears that upon information, he has reason to believe, the person charged to have violated the law does not meet the requirements of the Constitution.

"In other words, the magistrate should have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself by personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

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In the Court of Appeals in this Circuit it was held to justify the issuance of a warrant complaint must show probable cause stating the probable cause of the issuance, and the names of persons of affidavits that were taken in support of it.

Weinberg versus United States, 126 Federal 2nd, 1004.

U. S. versus Kaplan, 286 Fed. 963.

It was held, an affidavit for a warrant should state the particular grounds for probable cause for its issuance, and the names of the persons whose affidavits or depositions have been taken in support (15) thereof.

The Court: May I suggest that in view of the fact that I am going to read your memorandum that you don't read any more of it.

Mr. Lewis: I just want to give you a couple.

United States versus Dolan, 113 F. Fed. 757, he talks about the responsibility of the United States Commissioner, that he is the first judicial officer responsible for the warrant.

He says in the discharging of this task a frequent difficulty with which a Commissioner will find himself confronted arises when the complaint alleges, as I think it probably may, facts essential to the offense which are essentially the conclusions or inferences of the complaint from underlying facts.

"The Commissioner should not accept a complaint as instituting a criminal prosecution until by examination under oath of at least one witness he finds probable cause for believing the existence of one or more underlying facts from which in their context the ultimate reference might be reasonably made."

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I say it was incumbent upon Commissioner Epstein when he had a complaint like this which was devoid of all facts, to make an inquiry and to say (16) to the agent, upon which do you base your allegations, what are the facts, have you got an affidavit of the informant, what do you know of your own personal knowledge, is the informant in court?

In this particular case, Commissioner Epstein did nothing and he has before him a complaint which states no facts whatsoever.

As a matter of fact, your Honor, I say to you, based upon many of the complaints that I have seen, to me this is about the most barren complaint that I have ever encountered because there is nothing that Commissioner Epstein can say, this establishes probable cause.

Another famous case, United States versus King, 32 Fed. 2nd, 793, the Court said:

“A complaint not based upon the complaints and personal knowledge and unsupported—”

The Court: All of this is cumulative.

I have asked you not to read any more of them.

They cover the same point which you have already stressed.

Mr. Lewis: In a recent case, too, Giordenello versus United States, 357 United States, 480, this is one of the latest cases on the subject, our (17) Supreme Court granted certiorari to consider petitioner's challenge to the legality of his arrest, and the admissibility of evidence seized from his person at the time of the arrest.

It seems that an agent by the name of Finley of the Federal Bureau of Narcotics obtained a warrant for the arrest of petitioner from a United States Commissioner,

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based on a written complaint, sworn to by Finley which read in part:

"The undersigned complainant (Finley) being duly sworn, deposes and says:

"That on or about January 26th, 1956, at Houston, Texas, in the Southern District of Texas, Vito Gior-denello, did receive, conceal, et cetera, narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation in violation of Section 174, Title 21, and the complainant further states that he believes that—" (There are names that follow)—
"are material witnesses in relation to the charge."

Petitioner challenged the sufficiency of the warrant on two grounds:

1. That the complaint on which the warrant was issued was inadequate because the complaining (18) officer, Finley, relied exclusively upon hearsay information rather than personal knowledge in executing the complaint.

2. That the complaint was defective in that it in effect recited no more than the elements of the crime charged.

The Court said, it appears from Finley's testimony at the hearing on the suppression motion that until the warrant was issued, Finley's suspicions of petitioner's guilt derived entirely from information given to him by law enforcement officers and other persons in Houston, none of whom appeared before the Commissioner or submitted affidavits.

Now, that more or less bears out the other cases that I have stated to your Honor.

Then they cite the Constitution—

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The Court: What disposition did the Court finally make?

Mr. Lewis: I say—"The purpose of a complaint is to enable the Commissioner to determine whether the probable cause required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause.

(19) "He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

The Court held: "When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed.

"The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any source for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The Court further held:

"That procedure in this case was illegal and that the seized narcotics should not have been admitted in evidence."

Then the later case in this subject is *Draper versus United States*, 358 U. S. 307.

In the *Giordenello* case the Court made this very pertinent observation:

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(20) "We need not decide whether a warrant may be issued solely on hearsay information, for in any event we find this complaint defective for not providing a sufficient basis."

So there is left open the question of hearsay evidence, but only hearsay evidence is submitted.

Now, the Draper case, an experienced Federal narcotics agent by the name of Marsh, was told by one Hereford, who had been engaged as a special employee of the Bureau of Narcotics at Denver, for about six months, and from time to time gave information to Marsh regarding violations of the narcotics laws, for which he was paid small sums of money by Marsh and whose information Marsh had always found to be accurate and reliable, that the petitioner Draper was peddling narcotics in the City.

This conversation took place on September 3, 1956.

Four days later, on September 7th, 1956, Hereford told Marsh that Draper had gone to Chicago and that he was going to bring back three ounces of heroin either on September 8th or 9th, and would return to Denver by train.

(21) On September 9th, Marsh went to the railroad station and saw a man fitting the description that Hereford had given him, wearing the precise clothing described by Hereford, and walking in a fast manner as Hereford had said petitioner habitually did.

On September 8th, Marsh went down there to find out whether or not Draper had arrived, and he didn't show up and he went back to the railroad station.

He had been given a very detailed description of the clothing that Draper would wear and that he walked in a fast manner, and that he would have a certain type of briefcase, and so he went down on September 9th.

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The agent saw a man dressed just the way it had been described to him, walking in that particular gait and also carrying this particular briefcase.

He went over to him and apprehended him and found narcotics.

The Court said:

"The crucial question to be decided was whether knowledge of the related facts gave Marsh (22) probable cause within the meaning of the Fourth Amendment, to believe that petitioner had committed or was committing a violation of the narcotic laws."

If it did, the arrest though without a warrant and the subsequent search was lawful and the motion to suppress was properly overruled.

The Court: Didn't the Court sustain that arrest?

Mr. Lewis: Yes, and I will tell you why, your Honor.

They said that the information given to the narcotics agent by the special employee might have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duty had he not pursued it.

The Court: And it was apparently accurate because the proper man was seized.

Mr. Lewis: And when pursuing that information he saw a man having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag afloat and start to walk at a (23) fast pace toward the station exit.

Marsh had personally verified every facet of information given to him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag.

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And surely, with every other bit of Hereford's information being thus personally verified, Marsh had reasonable grounds to believe that the remaining unverified bit of Hereford's information—that Draper (petitioner) would have the heroin with him—was likewise true.

In our particular case, Judge, there is nothing before the Commissioner to show that Panzarella was a reliable informant.

There are no facts to verify that which Panzarella may have said in his statement because there are several cases which hold and which follow the Supreme Court where it has been well settled law that information received from an outside source however sufficient its contents might be will not suffice to show probable cause unless such source is believed to be reliable, or unless it has substantial verification or supplementation in facts (24) personally known to the officer or officers.

The Court: Wouldn't it be that one of the two agents, either Costa or Moynahan, would have sufficient confidence in his fellow agent to believe what he had said to him?

Mr. Lewis: If you can show me that in this complaint, Judge.

The Court: I haven't seen it.

Mr. Lewis: I read it to you.

All he says, a statement of Panzarella.

He doesn't state what the statement is.

The Draper case said that Hereford may have been hearsay information to Marsh, but coming from one who is employed for that purpose, et cetera, et cetera.

In other words, he should have told him that this Panzarella is a reliable informant, or commissioner, now we are going to give you facts which will verify that information or which will supplement it.

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You have nothing here.

All you have is a barren assertion.

The Court: Isn't this determination of the reliability of this informant a discovery after the (25) fact?

Mr. Lewis: No, Judge.

The fact that you make an arrest and you discover narcotics does not make an invalid or illegal arrest or make the search legal if it is an illegal arrest.

The Court: I am going to give Mr. Stewart a chance to argue.

You have had a little more time than what we had set.

Mr. Lewis: Just one more thing, Judge, there was a motion made before Judge Byers on June 30th, 1959; it is the same sort of a matter.

The petitioner there based his motion upon the Gior-denello case, but Judge Byers held that he felt that the Draper case applied in that case, and here is the difference in the draftsmanship of the complaint and why this application must be granted, because the Government in that case said:

After they repeated the elements of the crime, they say that the source of your deponent's information and the grounds for his belief are the statements made by Arnold Victor Horgensen and George G. Giordano, that the above named defendant (26) participated with them in the robbery of the above-described bank as well as the investigations of agents of the F. B. I. at said bank and elsewhere.

Judge Byers said:

"The statement upon which Jenkins relied in making the foregoing affidavit was that of the two persons who participated with the defendant in the commission of the above robbery.

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"In view of this, that circumstance is clearly to be distinguished from the matter considered in the cited case.

"A later decision which may be consulted is *Draper versus United States*.

"Being of the opinion that the information upon which Jenkins relied was such that if he had failed to act—"

The correct name is Jorgensen.

"—upon it he would have been derelict in his duty, the motion is denied."

Now, in our particular case all they have got is this bare assertion, a statement of Samuel Panzarella, but what the facts are in the statement we do not know.

The Court: I will hear Mr. Stewart.

(27) Mr. Stewart: First of all, I would like to raise this point, your Honor, that in the motion papers of DiBella moving to suppress the evidence seized, there is first of all no allegation that DiBella, that he is the owner of the items seized.

The items seized involved first of all over a pound of heroin, some eighty grams of cocaine plus scales and cutting equipment, and in addition some eight thousand, six hundred seventy-five dollars which was seized in cash when the defendant DiBella admitted it was the proceeds from his narcotics traffic.

I mention that first, your Honor, because I don't believe that he could move to suppress evidence seized when he does not allege that he is the owner of the items which the Government picked up at the time of the arrest.

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The Court: Do you have a case to support that?

Mr. Stewart: I believe the Lester case does.

Mr. Lewis: Why don't you read this paragraph to the Judge?

Mr. Stewart: Yes, I will.

"On or about March 9th, 1959, agents of the (28) Federal Bureau of Narcotics came to my apartment and after exhibiting to me a warrant for my arrest dated October 15th, 1958, proceeded to make a general exploratory investigation and seized said narcotics and in addition there to a suitcase containing miscellaneous papers and my passport—"

The Court: You mean he should have said that this was all my property?

Mr. Stewart: Yes.

I think there is certainly a presumption that the fact it was found in his apartment—

The Court: Well, those are matters which are reserved for the trial and not for the motion.

Mr. Stewart: The Government's contention is really two-fold, your Honor.

First, that under the present state of the law, the complaint which is based upon information and belief and personal observations by the deponent is in all probability valid and that in any event the agent actually making the arrest, Agent Costa, had very definite probable cause to make that arrest at the time he did so.

The Court: What was the basis of this, the information upon which probable cause would be (29) spelled out?

Mr. Stewart: May I sketch out the facts?

This investigation was conducted primarily by two agents, Agent Costa and Agent Moynahan.

The investigation was predicated upon the belief that

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Mario DiBella had for a period of some years been wholesaling narcotics out in Queens, that one of his customers was a man by the name of Panzarella.

Accordingly Agent Moynahan made contact with Panzarella and arranged for a purchase of an ounce of heroin on August 26th.

At the same time that the meeting was set up with Panzarella and his connection who he later found to be Mario DiBella, Agent Costa covered the premises which DiBella lived in.

Now, Panzarella told Agent Moynahan that before he could sell him this ounce of heroin he had to call his connection.

He then made a phone call to DiBella's home in the presence of Moynahan and arranged for a certain date, a certain hour where they were to meet out in Jackson Heights.

Moynahan went with Panzarella out to this (30) particular location at that point and Panzarella left Moynahan and went out to meet his connection.

At the same time Costa was observing the DiBella apartment and saw DiBella come out of his home, get into his car and drive down and meet Panzarella. They drove for a block or two in DiBella's car and Panzarella then leaves the vehicle and goes to Agent Moynahan where Costa sees him give him a package.

These are Costa's personal observations.

The Court: Incidentally, are any of the details to which you referred contained in the affidavit which was submitted in support of the application for the warrant?

Mr. Stewart: Those details were not, but they were brought before the Commissioner in the Government's application for a search warrant.

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Those facts were set forth in two affidavits, one from Costa and one from Moynahan in support of a search warrant on October 6th, which was denied for failure to show the time concerned; but now the narcotics in fact are—

Mr. Lewis: Your Honor, I am sorry to interrupt, but there were two different commissioners involved here, so the facts couldn't have been (31) brought before Commissioner Epstein.

The Court: You said that.

You told me that Commissioner Abruzzo had denied the application for a warrant.

Mr. Stewart: That is right, sir.

He denied it.

Now, a second purchase was arranged for.

The Court: Incidentally, is there any significance in the change in date in the affidavit from the sixth, which happens to be the date on which application for a warrant had been denied, and the 15th when the affidavit was submitted in support of the application for a search warrant?

Mr. Stewart: It happened this way, and it is a clear case of inadvertence.

There was originally an application for a search warrant in October, October 6th; at the same time arrest warrants were prepared.

The Court: Was it the same affidavit which was just resworn?

Mr. Stewart: No, sir.

When the search warrant was denied arrest warrants were sought on November 15th, but the search warrant had already been prepared at the same time (32) the application for the search warrant—that is, the arrest warrants had been prepared at the same time application was made for the search warrant.

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The Commissioner noticed the date as far as the complaint is concerned, and apparently marked it over, he didn't change it over the arrest warrant.

I don't think that it is terribly significant.

I think it is a clear case of inadvertence.

I would like to check into it further.

The Court: Is reference made to the affidavit by a reference to the name of the affiant, and if not to the date of the affidavit because I would be inclined to think that if that be so that it was an inadvertence.

The point that was raised is one, and a technical one of three or four different points in support of this argument—

Mr. Stewart: You mean in the search warrant, is the reference made to the particular affidavit?

The Court: Yes.

Mr. Stewart: I don't believe there is.

I shall check at once into it.

(33) The Court: The warrant of arrest refers to an incident which occurs on September the 10th, and that is the date alleged to have been the date of the occurrence in the accompanying affidavit.

Mr. Stewart: Yes.

In addition to the events of the sale of heroin by Panzarella, after having received it from DiBella on August 26th, your Honor, there was a second purchase by Agent Moynahan.

This took place on September 10th, 1958, some two weeks after the first purchase.

On September 10th, essentially the same procedure was followed with this exception,—that Panzarella told Agent Moynahan more about his connection and his background, and how long he had been in the business identifying him as the defendant, DiBella.

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There again Panzarella called DiBella, set up the appointment.

The same observation technique was followed. Agent Costa watched DiBella's home, watched him leave his apartment, come out, meet Panzarella, Panzarella and DiBella would then go together for a way, and then Panzarella would go to Agent Moynahan and (34) give him a package which later turned out to be heroin.

The Court: Were these facts or any of them officially brought to the attention of Commissioner Epstein at the time a warrant was issued?

Mr. Stewart: You mean verbally?

The Court: You said officially, apparently they weren't in the affidavit because Mr. Lewis says they were not.

Were they questioned by the Commissioner?

Was any of this information brought to the attention of the Commissioner, Commissioner Epstein, so that they may have been considered by him in satisfying himself that there was probable cause?

Mr. Stewart: I would have to check on that. I don't recall.

There was some discussion, whether it covered the probable cause question or not, I cannot say. I know there was a discussion as to the need for secrecy in the issuing of the warrant, and the reasons for that I believe were given.

I would have to check with the agents who were present at that time.

Of course, the search warrant was sought and (35) the search warrant application was denied.

There was a lapse of time between the issuance between the arrest warrants on November 15th, 1958, to March 9, 1958, before the actual arrest was made.

This was done in order to try to find out who else was

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associated with the man DiBella in the narcotics traffic; and that not proving successful they went ahead and arrested him in the apartment using the old warrant that they had outstanding for his arrest.

The Court: Then using the arrest for a basis for making a search of the premises?

Mr. Stewart: Your Honor, that is another point that I would like to come to now.

When they went up to the apartment on March 9th, they identified themselves as agents from the Bureau of Narcotics, and Costa identified himself, showed his credentials.

The door was opened by Jean DiBella, a stepdaughter of the defendant.

Prior to the time that they hit the apartment they had been in a neighboring building and they had seen DiBella sitting in his living room, (36) so that they knew he was in the apartment when they went there.

When Jean DiBella opened the door and the agents identified themselves, she opened the door and ushered them in, motioning with her hand to come into the apartment. There was no threats or force to get into the apartment. They asked for her father and she said that he was in the living room.

They went into the living room and showed him their credentials and showed him a copy of the warrant of arrest.

The Court: Was this shown after they had already gained admittance voluntarily on the part of the occupants?

Mr. Stewart: Yes.

They identified themselves first and asked to speak with Mr. Mario DiBella. They then showed him the arrest warrant. The arrest warrant was not used to gain access to the apartment.

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DiBella and his wife both state this, and read through the warrant which was shown to them.

At that point one of the agents who had been outside of the building came in and asked the other agents in DiBella's presence whether DiBella had been (37) informed as to why they had been there.

DiBella said, you don't need to tell me, I know why you are here.

He said, all the stuff is in a certain closet, a closet in the bedroom, and he went to that closet and pointed to it and went to open it.

The agent instead opened a closet door, the bedroom was off the living room, opened the closet and saw the suitcase there. He took it out and opened it up and put it on the bed and that was the suitcase that contained the pound of heroin and cocaine and cutting equipment.

They then asked him whether he had any valuables which should be secured and he then went out and produced a strongbox containing \$2,675.00 in cash.

After they determined that the suitcase contained heroin and cocaine and DiBella had then produced this money they went ahead and did conduct a search of the apartment, but that came after he had voluntarily pointed out to the agents that he did have narcotics right there in his apartment.

The Court: You say after they satisfied themselves that it was narcotics. Was this a field (38) test—was a field test performed or by his statement alone?

Mr. Stewart: There was a field test. They did conduct an examination. I am not sure whether it was a field test of the goods in the suitcase.

So that first of all, I would contend that the complaint is in all probability valid and that the warrant is valid and

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that in any event, Costa had within his mind those facts necessary to constitute probable cause to arrest DiBella for the two prior sales.

The Court: Having the facts in his mind, is that adequate for the issuance of the warrant?

Mr. Stewart: For an arrest warrant, your Honor, if they were in his mind, they should have been set forth in the complaint, but whether the complaint sets it forth or not, even assuming that the warrants were to be invalid, Agent Costa still had probable cause to effect that arrest on the basis of what he knew about these two prior sales.

Stretching it to the ridiculous point, if for any reason a man like DiBella should make two sales of narcotics in succession and through inadvertence or an invalid issuance of a warrant for (39) arrest an agent should have the knowledge in his mind that he had made these sales and the ability to prove it, it would give him immunity for an arrest for the rest of his life merely by virtue of the issuance—

The Court: If he had enough knowledge justifying arrest why did he need a warrant?

Mr. Stewart: He didn't need a warrant in this case.

The only reason that it was given to him, because he asked for one as a matter of bureau policy.

He could have gone right out there and the narcotics law provides that it is perfectly permissible for the agent to go out there to make the arrest without a warrant, provided that he has probable cause to believe that he has committed a crime.

I am very sorry that the warrant was ever issued, but it is too late.

The Court: Mr. Stewart asked for time to reply to your memorandum.

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How much time do you want?

Mr. Stewart: I would like ten days, if your (40) Honor would allow me.

The Court: We will give you to the eighth of September.

You file your reply brief with the Clerk and serve a copy to Mr. Lewis.

I want to give him an opportunity, if he feels it is necessary, to reply.

I will give him until the 11th to do it.

Mr. Stewart: The only other point that I want to make is this, your Honor, that the Giordenello case which Mr. Lewis relies on where they struck down a seizure made incidental to an arrest with an arrest warrant, specifically said that if there were a new trial that the Government was not to be foreclosed from showing that the agent who made the arrest had probable cause to do so.

If I may, I will read to you that particular portion of it—

They didn't allow them to—

The Court: How would that in any way influence me in my determination of this motion regardless of what my position would be?

Any order to be entered on this motion is appealable and in the second place, on a trial of the case (41) the Court held that the agent involved despite the fact that the warrant may have been improperly issued would have the right to testify that he made a proper arrest.

That would come upon the trial.

Mr. Stewart: I merely wish to point that out, that they left that open in the Giordenello case, and the Draper case—

Mr. Lewis: Your Honor, that is a common rule of law.

I just want to say this, whether or not he had probable

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cause to make the arrest without the warrant had nothing to do with this motion.

They got the warrant, they arrested the man, pursuant to the warrant, they arraigned him before Commissioner Schiffman, pursuant to the warrant, and the returned part of it based on the warrant the agent said, Agent Costa says, I brought this man into court based on this warrant.

This is an interesting point here where you use a warrant to make an exploratory search is to be condemned—

The Court: Who determines whether it was used for a pretension?

(42) Mr. Lewis: That is for you to determine.

October, 1958, the warrant was issued, and the agents had knowledge where the man lived and they could have arrested him within a day or two, and they waited until five months' time had elapsed, and they didn't go there to make an arrest, they went there to make an exploratory search to discover if there was narcotics.

The Court: That does not conform to Mr. Stewart's explanation on why there was a hiatus.

He said that they were trying to get others involved in the illicit operation.

Mr. Lewis: That is for your Honor to decide, because there is a Supreme Court case right on that particular point, where they condemn an exploratory search using a warrant of arrest as a basis for it.

The Court: All right.

All papers by September 11th.

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Opinion of Rayfiel, U.S.D.J.

(92) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 2225

[SAME TITLE]

Appearances:

JEROME LEWIS, Esq.,

*Attorney for defendant Mario DiBella,
For the Motion.*

HON. CORNELIUS W. WICKERSHAM, JR.,

United States Attorney.

By CHARLES L. STEWART, Esq.,

Assistant United States Attorney.

In Opposition.

RAYFIEL, J.

The defendant, Mario DiBella, moves under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress all evidence seized in his apartment at 35-15 80th Street, Jackson Heights, Queens County, New York, on March 9, 1959 by agents of the Federal Bureau of Narcotics, as well as any and all evidence gleaned herefrom, on the ground that the search and seizure was unlawful, being violative of the Fourth Amendment of the Constitution of the United States and of Rules 3 and 4 of said Rules.

(93) The defendant bases his motion on the following three grounds:

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1. that the warrant of arrest was invalid because the complaint on which it was based did not state facts sufficient to show probable cause;

2. that his arrest under said warrant was used as a pretext to make an exploratory search of the defendant's apartment; and

3. that the warrant was invalid because it bore the date October 6th, 1958, while the complaint on which it was based was dated October 15th, 1958.

As to the third ground, it is palpable that the error in date was inadvertent. Both the warrant and the complaint on which it was based, were *originally* dated October 6th, 1958. The date on the complaint was changed in ink to October 15th, 1958 when it was sworn to before Commissioner Epstein. The date on the warrant, however, was not changed and was thus signed by the Commissioner. This was clearly an oversight and should and does not affect the validity of the warrant, which obviously, was issued on October 15th, 1958. As a matter of fact defendant's counsel, in the statement of undisputed facts contained in his brief, alleges "1. That on the 15th day of October, 1958 a warrant was issued" (Emphasis supplied.)

As to the failure of the complaint to state facts showing (94) *probable cause*.

The complaint alleges on *information and belief* that "the defendants, *Mario DiBella* and *Samuel Panzarella*, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: approximately one ounce of heroin hydrochloride, a derivative of opium. . . ."

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The following paragraph states "That the source of your deponent's information and the grounds for his belief are *your deponent's personal observations in this case*, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics." (Emphasis added.)

Doubtless the complaint was inexpertly drawn. It alleges, *on information and belief*, that the sale of the heroin took place on September 10th, 1958, and then goes on to say that the *source* of the complainant's information and *grounds* for his belief, are, among other things, *his own observations*. Obviously, if the sources of his information were his own observations, then he had *personal knowledge* of the facts.

I have read the statements of Agents Costa and Moynihan which are set forth in Appendix B and C, attached to the affidavit submitted in opposition to this motion by Assistant United States Attorney Charles L. Stewart. These statements were originally (95) attached to an application for a search warrant made before Commissioner Abruzzo, who denied the same: I have considered them as having been submitted in opposition to this motion.

Agent Moynihan's statement alleges that he had met one Samuel Panzarella, a co-defendant of DiBella, who offered to sell him heroin, the sale to take place at 8:00 A.M. on August 26, 1958; that he met Panzarella in Manhattan at 6:00 A.M. on that day and was told by him that he wanted to call his source of supply, whereupon Panzarella made a telephone call, after which he and the agent drove to 79th Street, north of Roosevelt Avenue, in Jackson Heights, Queens, New York, where they parked; that Panzarella then left the vehicle, walked to 79th Street and 37th Avenue, and entered a green Chrysler automobile bearing New York license number 6971 N E; that he observed Panzarella leave

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that vehicle several minutes later at 79th Street and Roosevelt Avenue and return to the car in which he, the agent, was waiting, after which Panzarella handed him a glassine envelope containing a white powder, which subsequent tests proved to be an ounce of heroin hydrochloride. That on September 10th, 1958 a similar series of events occurred: at 9:30 P.M. on that day he met Panzarella in Manhattan, was told by him that he would have to go to Jackson Heights to meet his source of supply, and after Panzarella made a telephone call they both went to 74th Street (96) and Roosevelt Avenue; Panzarella then left the agent, met the defendant Mario DiBella, walked with him from 74th Street to 37th Road and then returned to the agent; they both drove back to Manhattan, and enroute Panzarella handed him a glassine envelope containing heroin hydrochloride, and stated to him that DiBella was his source of supply and had supplied the heroin which has been sold to the agent on August 26th, 1958 and September 10th, 1958.

Agent Costa's affidavit alleges that on August 26th, 1958, at 7:30 A.M. he saw the defendant Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, enter his Chrysler automobile, license number 6971 N E, drive to 37th Avenue and 79th Street where he met Panzarella, who entered the car, and DiBella then drove to Roosevelt Avenue and 79th Street, where Panzarella left the car and walked to 78th Street, where he met Agent Moynihan, to whom he handed a small envelope the contents of which later tests showed to be heroin hydrochloride; that at 11:00 P.M. on September 10th, 1958 he observed DiBella leave Apartment 42 at 35-15 80th Street, Jackson Heights, walk to Roosevelt Avenue and 74th Street, where he met Panzarella, and then walked with him to 76th Street near Roosevelt Avenue, where they separated, after which Panzarella

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met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he stated he (97) had obtained from DiBella.

It is evident from these statements that Agent Costa had personal knowledge of the events which led to DiBella's arrest. He so stated in the affidavit which he submitted in support of the application for the warrant which was issued by Commissioner Epstein on October 15th, 1958 and executed on March 9th, 1959.

The facts in this case are infinitely stronger than those in *Giordenello v. United States*, 357 U. S. 480, cited by the defendant in his brief. There the names of the witnesses were left blank in the complaint on which the warrant was issued, and the agent testified that when the warrant was issued "his suspicions of the petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits" (p. 485). The Supreme Court there held that this complaint was "defective in not providing a sufficient basis upon which a finding of probable cause could be made."

In the case at bar Agent Costa had had the defendant under observation. He saw him meet Panzarella on two occasions, after which the latter made sales of heroin to Agent Moynihan. The complaint names Panzarella as a person who made statements in the case, and alleges that the sources of the agent's information were his "personal observations in this case, the statements of (98) Samuel Panzarella, and other witnesses in this case and the reports and records of the Bureau of Narcotics." The facts in the case at bar are similar to those in the case of *Lathem v. U. S.*, 259 F. 2d 393, where the Court said at page 398, "Here, it is clear that Slotnik had personal knowledge, based his charge on knowledge, not belief, and that the com-

Opinion of Rayfel, U.S.D.J.

plaint is an affirmative statement from an affiant with personal knowledge. Unlike the *Giordenello* case, the Commissioner could determine whether there was probable cause for issuance of the warrant. He did not have to accept a mere conclusion." In my opinion the complaint herein was sufficient and the warrant was properly issued thereon.

However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that DiBella had committed a violation of the Narcotics Acts sufficiently reasonable to justify his arrest without a warrant. Section 7607 of Title 26, U. S. Code, states that among others, Agents of the Bureau of Narcotics may "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested (99) has committed or is committing such violation."

In the recent case of *Draper v. United States*, 358 U. S. 307, an Agent of the Bureau of Narcotics in Denver arrested the defendant without a warrant after having been advised by one Hereford, a "special employee", that the defendant was peddling narcotics, that he had gone to Chicago to purchase heroin, and would return to Denver with it on September 8th or 9th, 1956. Hereford gave the Agent a physical description of the defendant and the clothes he was wearing, informed him that he would carry a tan zipper bag, and that he habitually walked fast. On the morning of September 9th the Agent saw a person answering that description and carrying a tan zipper bag, alight from an incoming Chicago train at the Denver sta-

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tion and walk quickly toward the exit. The Agent, accompanied by a police officer, arrested defendant, searched him and found two envelopes containing heroin clutched in his left hand in his raincoat pocket. The defendant attacked the arrest and subsequent search and seizure as violative of the Fourth Amendment, in that the information given by Hereford to the Agent was hearsay and could not be considered by him in determining whether there was probable cause, and that the Agent's information was insufficient to meet the test of "probable cause" and the requirement that there be reasonable grounds for believing a violation had taken place."

(100) The Supreme Court rejected both arguments. It held, at pages 311 and 312, that *Brinegar v. U. S.*, 338 U. S. 160, had decided that there was "a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." 338 U. S. at 172, 173. The Agent, therefore, they hold properly considered Hereford's information, even though it was hearsay, in arriving at "probable cause."

The decision went on to say at page 313 "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar v. United States*, *supra*, at 175. *Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief*

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that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162." (Emphasis added.)

In the case of *United States v. Walker*, 246 F. 2d 519, Circuit (101) Judge Finnegan reviewed the whole field of the law respecting arrests without a warrant, and stated at page 527, "Reasonable ground then, is the litmus paper for testing validity of arrests without a warrant. Implicit in such test is the exclusion of arbitrary and capricious interference with individual freedom. Dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. Consequently organic law, reflected in the relevant statutes and Rules of Criminal Procedure interpose the judiciary between law enforcement officers and citizens by requiring, as normal procedure, application for warrants and the attendant opportunity for the judicial branch to pass on the question of probable cause. This constitutional insulation against infringing basic rights is removed only under classes of exigencies which have been judicially approved on review and now form a discernible pattern of instances, excusing law-enforcement officers for by-passing the requirement of having the judiciary first rule upon the question of probable cause. In those situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard. After all when an arrest without a warrant is classed as valid, it simply means such action is judicially tolerated as being within (102) constitutional bounds of reasonableness as officially or pragmatically defined as case-law. Fresh combinations of facts must necessarily be examined under the terms labelled 'probable cause' and 'reasonable grounds' for neither one is a static concept. But the criteria em-

Opinion of Rafiel, U.S.D.J.

bedded in each continues to be one that refuses approval for arrests without a warrant where an officer is stimulated by an *inkling only*. For he must act as a man of reasonable caution. 'Suspicion' is an elusive word with a wide spectrum of intensities and courts must examine the facts underlying it rather than be deflected by the word itself." (Emphasis added.)

It is my opinion that the evidence in the possession of Agent Costa was more than sufficient to give him reasonable ground to believe that DiBella had violated the Narcotics Acts on August 26, 1958 and September 10, 1958, on both of which occasions he had *personally* observed him meet Panzarella immediately prior to the sales of heroin to Agent Moynihan, about which he was told by the latter, who is clearly a more reliable source of information than were the informers in the *Draper* and *Walker* cases, *supra*. Agent Costa could, therefore, have arrested the defendant DiBella without the warrant on March 9th, 1959.

The arrest having been properly made, I find that the search incident thereto was proper, and that the evidence resulting therefrom was not illegally obtained.

(103) The motion is in all respects denied, without prejudice, however, to a renewal thereof on the trial.

Settle order on notice.

Dated: November 4th, 1959

LEO F. RAYFIEL
United States District Judge

Order Appealed From**(104) UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

Motion having been made by the defendant, Mario Di Bella, for an order suppressing all evidentiary items seized by agents of the Federal Bureau of Narcotics on or about March 9, 1959, in the said Di Bella's apartment at No. 35-15 80th Street, Jackson Heights, Queens, New York, together with any and all information gleaned from said seizure, and said motion having come on to be heard on the 25th day of August 1959, before the Honorable Leo F. Rayfiel, United States District Judge, and after reading the Notice of Motion and Affidavits and Memoranda submitted in support of and in opposition thereto, and having heard Jerome Lewis, Esq., attorney for the defendant, Mario Di Bella, in support of said Motion, and Cornelius W. Wickersham, Jr., United States Attorney, by Charles L. Stewart, Assistant United States Attorney, in opposition thereto, and due-deliberation having been had and the Court having rendered its opinion denying said Motion on the 4th day of November 1959, and in accordance with said opinion, it is hereby

ORDERED, that the said Motion is in all respects denied without prejudice, however, to a renewal thereof at the time of trial.

Dated: Brooklyn, New York
November 30, 1959.

LEO F. RAYFIEL
United States District Judge

Notice of Appeal

(105) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 2225

In the Matter of the Application

of

MARIO DI BELLA

for an order suppressing all evidentiary items seized by Agents of the Federal Bureau of Narcotics on or about March 9th, 1959, in premises No. 35-15 80th Street, Jackson Heights, Queens, New York.

Name and Address of Appellant:

Mario Di Bella
35-15 80th Street, Jackson Heights
Queens, New York

Name and Address of Appellant's Attorney:

Jerome Lewis
66 Court Street
Brooklyn, New York

Offense:

Appellant charged with selling, dispensing and distributing a narcotic drug, to wit: heroin, in violation of Title 26 U.S.C. Section 4704 (a) and Title 18 U. S.C. Section 2.

Notice of Appeal

Concise statement of judgment or order, giving date, and any statement:

This is an appeal from an order of Hon. Leo F. Rayfiel, United States District Judge for the Eastern District of New York, dated November 30th, 1959, denying the appellant's motion to suppress all evidentiary items seized by Agents of the Federal Bureau of Narcotics in his apartment on the ground that the seizure was illegal and the search unlawful in violation of the Fourth Amendment of the United States Constitution and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure. This motion was made prior to the filing of an indictment.

(106) The appellant is presently on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated order.

Dated December 2nd, 1959

JEROME LEWIS

Attorney for Appellant

[fol. 93a]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 349—October Term, 1959

Argued June 14, 1960

Docket No. 26049

MARIO DiBELLA, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

Before: Waterman, Moore and Hamlin,* Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Rayfiel, J., denying a motion for the suppression of evidence obtained by means of an allegedly unlawful search and seizure. Affirmed.

Jerome Lewis, for appellant.

Cornelius W. Wickersham, Jr., United States Attorney, Eastern District of New York (Joseph J. Marcheso, Assistant United States Attorney, of counsel), for appellee.

[fol. 94a]

OPINION—November 23, 1960

HAMLIN, *Circuit Judge*:

Mario DiBella, appellant, appeals from an order of the District Court denying his motion to suppress certain evi-

* Of the Ninth Circuit, sitting by designation.

dentiary items seized in his apartment by agents of the Federal Bureau of Narcotics on March 9, 1959, at the time of his arrest. The motion was made after arrest and arraignment of appellant but before his indictment.

On November 30, 1959, subsequent to his indictment, the motion was denied by the District Court, with leave to renew it at the time of trial. On December 3, 1959, appellant gave notice of appeal to this Court from the order of the District Court. There has as yet been no trial of appellant.

Initially, the United States, appellee, raises the question as to whether such an order is appealable.

Over a period of many years this Court has consistently held that where the application is made prior to indictment, as it was in this case, that a defendant may appeal to this Court from an order denying his motion to suppress. *United States v. Poller*, 43 F. 2d 911 (2 Cir. 1930); *Cheng Wai v. United States*, 125 F. 2d 915 (2 Cir. 1942); cf. *United States v. Klapholz*, 230 F. 2d 494 (2 Cir. 1956); *United States v. Russo*, 241 F. 2d 285 (2 Cir. 1957).

We hold the order made by the District Court in this case to be appealable.

The motion was argued before the District Court by counsel on either side and affidavits and counteraffidavits were presented for his consideration. From the showing there made, the following factual situation appeared. On October 15, 1958, one David W. Costa, a special agent of the Federal Bureau of Narcotics, presented to United States Commissioner Epstein in the Eastern District of New York a complaint praying for the arrest of appellant. This complaint stated:

[fol. 95a] "That upon information and belief, the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York . . . unlawfully sell, dispense and distribute a narcotic drug, to-wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law . . .

"That the source of your deponent's information and the grounds for his belief are your deponent's personal

observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

Upon the basis of this complaint Commissioner Epstein issued a warrant of arrest.

On March 9, 1959, the narcotic agents saw appellant sitting in his living room in his apartment. At 8:15 p.m. Agent Costa, with the warrant of arrest in his possession, went with other agents to appellant's apartment. It was nighttime. The agents rang the bell and the door was opened by appellant's stepdaughter. The agents identified themselves, showed her their credentials, and walked into the living room, where they identified themselves to appellant, showed him a copy of the arrest warrant, and placed him under arrest. A quantity of narcotics was found, which, together with other items, the agents seized.¹

¹ The foregoing facts are undisputed. The only substantial conflict in the affidavits concerns the circumstances of the search. According to the affidavit of the Assistant United States Attorney the agents asked DiBella if he would permit them to make a search of the apartment. Appellant then told one of the agents "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." Appellant then took the agents to his bedroom where a suitcase was found in the closet, and opened. It contained approximately a pound of heroin, a quantity of cocaine, and certain paraphernalia used to "cut" the narcotics. Appellant then stated that this was all the heroin he had in his possession. Approximately \$8,675 was found in the apartment, and appellant later admitted that this money represented profits which he had made in the sale of narcotics. Appellant also later admitted that he had voluntarily turned over the seized heroin to the agents at the time that they visited his apartment to arrest him.

An affidavit filed by DiBella's counsel presents a different version of the events following DiBella's arrest. According to this affidavit "About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

DiBella's affidavit is not contrary to either of the above affidavits but merely states that the agents, after exhibiting to him the warrant for his arrest, "proceeded to make a general exploratory examination of my apartment. They discovered a quantity of

[fol. 96a] In *Application of Fried*, 68 F. Supp. 961, consideration was given to the sufficiency of a complaint upon which a warrant of arrest was issued. There, the complaint, after alleging that the defendants had in their possession certain goods and chattels knowing the same to have been stolen, contained the following statement:

"The sources of deponent's information and the grounds of his belief are an investigation conducted by him in the course of his official duties."

The Court there held "Such a complaint will not support a warrant of arrest. *U. S. v. McCunn*, D. C. S. D. N. Y., 1930, 40 F. 2d 295; *United States ex rel. King v. Gokey*, D. C. N. D. N. Y., 1929, 32 F. 2d 793; * * * *United States v. Pollack*, D. C. N. J., 1946, 64 F. Supp. 554; *United States v. Ruroede*, D. C. S. D. N. Y., 220 F. 210."

Recently the question of the sufficiency of a complaint to justify a warrant of arrest was considered in *Giordenello v. United States*, 357 U. S. 480.

[fol. 97a] The complaint in that case read as follows:

"The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas * * *, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; * * *

"And the complainant further states that he believes that are material witnesses in relation to this charge."

In striking down the complaint as insufficient in that case, the Court said:

"The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any

narcotics in my apartment and seized said narcotics and in addition thereto a suitcase, miscellaneous papers, my passport and divers other items."

Under either version it does not appear that the search of appellant's apartment was an unreasonable one.

sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The Court further said:

"Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it * * *'. The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ' * * * no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized,' of course applies to arrest as well as search warrants."

[fol. 98a] We hold that the complaint upon which the warrant of arrest was based was deficient in this case, and would not support the warrant of arrest which was issued under it. It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been committed was grounded on his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics," but what other sources could there possibly be? Such a shotgun, all-encompassing enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless "other witnesses" or the unidentified "reports and records." The complaint is no better than that in *Giordenello v. United States*, and the warrant is invalid for the same reasons.

Appellee, however, contended in the court below (as it contends here) that regardless of any objection of appellant that the warrant of arrest was improperly issued, that

Agent Costa had probable cause to effect a valid arrest of appellant under the authority of 26 U. S. C. §7607, which states that, among others, agents of the Bureau of Narcotics may:

"(2) Make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

[fol. 99a] The District Court, in its opinion agreeing with the position of appellee, stated: "However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that Di-Bella had committed a violation of the Narcotics Acts sufficiently reasonable to justify his arrest without a warrant." To properly evaluate this contention, we shall examine some of the further facts that were presented upon the hearing to the District Judge.

It appears that on October 6, 1958, Agent Costa and another agent, one Daniel D. Moynihan, in an endeavor to obtain a search warrant each signed and presented to United States Commissioner Abruzzo an affidavit which set forth the knowledge each agent had from personal observation and from information received, concerning the activities of appellant in connection with possession and sale of narcotics.

These affidavits set forth in detail certain events occurring on August 26, 1958, and on September 10, 1958, from which it could be inferred that there was a sale of narcotics on each of those two occasions by appellant to the narcotics agents through one Panzarella. These affidavits are set out in full in a footnote.²

² [AFFIDAVIT OF DAVID W. COSTA]

EASTERN DISTRICT OF NEW YORK, ss.:

DAVID W. COSTA being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2,

[fol. 100a] A search warrant was not issued by United States Commissioner Abruzzo, to whom the affidavits were presented, but the affidavits were presented to the District Judge for his consideration on the instant motion to suppress.

and that he has been assigned since the latter part of July, 1958, together with Daniel D. Moynihan, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale not from the original stamped packages and not pursuant to any written order form in violation of the provisions of the Internal Revenue Tax Laws.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Upon information and belief, Mario DiBella rents apartment #42 at 35-15 80th Street, Jackson Heights, Queens, New York.

At 7:30 A.M. on August 26, 1958, I observed Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, Long Island, New York. DiBella walked to the street and entered his Chrysler automobile New York License No. 6971NE. DiBella drove to 37th Avenue and 79th Street, Jackson Heights, where he met one Sammy Panzarella, who entered the Chrysler automobile driven by DiBella. The two men drove to Roosevelt Avenue and 79th Street where Panzarella left the car. I observed Panzarella walk to 78th Street, where, upon meeting Agent Moynihan, Panzarella handed a small envelope to him. Later tests showed that this envelope contained heroin hydrochloride.

A second purchase of heroin from Panzarella was arranged by Agent Moynihan to be effected September 10, 1958.

At 11:00 P.M. September 10, 1958, I observed Mario DiBella leave Apartment #42 at 35-15 80th Street, Jackson Heights, New York and walk to Roosevelt Avenue and 74th Street where he met Panzarella. DiBella and Panzarella then walked to 76th Street near Roosevelt Avenue, where they parted company. Panzarella then met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he claimed he had obtained from DiBella.

Upon information and belief, Mario DiBella has been a source of supply of heroin hydrochloride to Samuel Panzarella over a period of years; that on each of the two occasions described above, Mario DiBella left his apartment #42 35-15 80th Street, Jackson

In *Draper v. United States*, 358 U. S. 307, at 310, it was held that where a narcotic agent had "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of the Narcotic Control Act to believe that a person had committed or was com-

Heights, New York and proceeded directly to meet Samuel Panzarella; that Samuel Panzarella then proceeded directly to Agent Moynihan and sold him a quantity of heroin hydrochloride.

That the source of your deponent's information and the grounds for his belief are the investigation and reports of Agents of the Bureau of Narcotics; the statements of Samuel Panzarella and other witnesses and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David W. Costa on October 6, 1958.)

[AFFIDAVIT OF DANIEL D. MOYNIHAN]

EASTERN DISTRICT OF NEW YORK, ss.:

DANIEL D. MOYNIHAN being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with David W. Costa, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely: heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale and that these drugs are not from the original stamped packages and not pursuant to any written order form, in violation of the provisions of the Internal Revenue Tax Laws.

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

Your deponent met one Samuel Panzarella who offered to sell heroin to your deponent. At the time of the meeting, Samuel Panzarella and your deponent agreed to effect the sale of heroin to your deponent, this sale to be made on August 26, 1958 at 8 o'clock in the morning. At six o'clock in the morning on August 26, 1958 your deponent met Samuel Panzarella in

[fol. 101a] mitting a violation of the narcotics laws, he could make a lawful arrest. The Court there said, quoting *Brinegar v. United States*, 338 U. S. 160, 172-173:

“There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and there-

Manhattan. Samuel Panzarella stated that he wished to telephone his source of supply of heroin, and he thereupon made a telephone call. After the telephone call was completed, Samuel Panzarella stated to your deponent that delivery of the heroin would be made to your deponent at 8:30 A.M. that morning.

Your deponent then drove with Samuel Panzarella to Jackson Heights, Long Island and parked on 79th Street, north of Roosevelt Avenue. Samuel Panzarella left the vehicle at about 7:30 A.M. that morning and your deponent observed him walk to 79th Street and 37th Avenue and enter a green Chrysler, New York license #6971NE. Your deponent observed Samuel Panzarella leave that Chrysler several minutes later at 79th Street and Roosevelt Avenue. Samuel Panzarella then returned to the vehicle used by your deponent, and at 8:05 A.M. that morning Samuel Panzarella handed your deponent a glassine envelope containing a white powder which subsequent tests proved to be an ounce of heroin hydrochloride.

A similar pattern of events followed on September 10, 1958. At 9:30 in the evening of September 10, 1958, Samuel Panzarella and your deponent met in Manhattan, where Samuel Panzarella offered to sell your deponent another ounce of heroin. Samuel Panzarella stated that it would again be necessary to go to Jackson Heights to meet his “connection,” and that he would telephone his “connection.” Panzarella then made a telephone call at 9:40 P.M. on September 10, 1958. Your deponent and Samuel Panzarella went to 74th Street and Roosevelt Avenue, Jackson Heights, Long Island, New York. At 11:05 P.M. Samuel Panzarella left your deponent. Your deponent observed him meet Mario DiBella a few minutes later, and saw Mario DiBella walk with Samuel Panzarella from 74th Street to 37th Road. Samuel Panzarella returned to your deponent at 11:20 P.M. and your deponent and Samuel Panzarella then drove to New York City. En route, Samuel Panzarella handed a glassine envelope containing a white powder to your deponent, which powder was tested and found to be heroin hydrochloride.

Samuel Panzarella stated that DiBella was his source of supply of heroin and that DiBella had supplied the heroin sold to your deponent on September 10, 1958 and August 26, 1958.

No tax stamps were seen by your deponent on either of the glassine envelopes received from Samuel Panzarella on September

[fol. 102a] fore a like difference in the *quanta* and modes of proof required to establish them.'"

At page 313, the Court said:

"'In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. [fol. 103a] United States, supra*, at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States*, 267 U. S. 132, 162."

In the present case, Costa had not only the benefit of his own observations of the contacts and activities of appellant and Panzarella, but he also had the benefit of the information given him by Agent Moynihan as to the sales of heroin by Panzarella to Moynihan.

An examination of the affidavits of Agents Moynihan and Costa shows that both on August 26, 1958, and on September 10, 1958, appellant and Panzarella were under

10, or August 26, 1958, nor was the sale of these two packages pursuant to a written order form.

Upon information and belief, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York on each of the two occasions described above and met Samuel Panzarella directly thereafter; that Samuel Panzarella then directly proceeded to meet your deponent and the sale of heroin was effected; that Mario DiBella has been a source of supply of illegal heroin hydrochloride for an extended period.

That the source of your deponent's information and the grounds for his belief are the statements made by Samuel Panzarella, the observations and investigation of other narcotic agents and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by Daniel D. Moynihan on October 6, 1958.)

the surveillance of each agent. On August 26, for instance, Panzarella agreed to sell Moynihan heroin, and stated that he had to contact his connection. He made a telephone call and then went with Agent Moynihan to 79th Street near Roosevelt Avenue in Jackson Heights. Moynihan saw Panzarella leave his vehicle, walk to 79th Street and 37th Avenue, and enter a green Chrysler automobile with New York license No. 6971NE. Moynihan saw Panzarella leave the Chrysler a few minutes later at 79th Street and [fol. 104a] Roosevelt Avenue, and saw Panzarella return to his vehicle, upon which Panzarella handed to Moynihan the envelope which proved to contain heroin. At the same time, Costa saw appellant enter the same Chrysler automobile and saw him drive to 37th Avenue and 79th Street, saw him meet Panzarella who then entered the Chrysler automobile. He saw the two men drive to 79th Street and Roosevelt Avenue and saw Panzarella leave the automobile. Costa then saw Panzarella walk to 78th Street and meet Agent Moynihan and hand a small envelope to him. The later tests showed that this envelope contained heroin.

Likewise, on September 10, 1958, each agent saw approximately the same procedure followed between Panzarella and appellant. On the latter occasion, Panzarella, after being in contact with appellant, came back to Moynihan and sold him an ounce of heroin which he told Moynihan he obtained from DiBella. Appellant was seen meeting Panzarella, be with him briefly, and Panzarella was seen to immediately return to Moynihan with the heroin.

Taking all of the circumstances together, we believe that there was ample evidence to hold that Costa had "reasonable grounds to believe" that appellant had committed a violation of the narcotics laws. With all the information Costa had, both from his own observation and from information received from Moynihan, Costa would have indeed been naive if he did not believe that appellant had just provided the narcotics which Panzarella delivered to Moynihan. Although Costa's affidavit was based in part on hearsay, there was "a substantial basis for crediting" the information given him by a fellow-agent, information which was wholly consistent with what Costa himself had observed. *Jones v. United States*, 362 U. S. 257, 269. We

hold that at any time after September 10, 1958, Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics laws.

[fol. 105a] Appellant contends, however, that the delay from September, 1958, until March, 1959, when the arrest was made, was sufficient to say that in March, 1959, Costa did not have reasonable grounds to believe that DiBella had committed a narcotics violation. We cannot so hold.

An explanation was given by appellee that the delay was occasioned by a desire on the part of the agents to uncover further violations. Be that as it may, we do not believe that the delay eradicated from Costa's mind the knowledge that he had received by September, 1958, of appellant's apparent violations of the narcotics laws.

When appellant was arrested on March 9, 1959, Costa had in his possession the warrant of arrest which had been issued October 15, 1958, and after arresting appellant under color of this warrant, which we have held to have been invalidly issued, made a return on it showing that he had executed the warrant by arresting DiBella on the 9th day of March, 1959.

We do not believe that this helps appellant. Although Costa apparently believed that this warrant was a valid one, yet, even though it was not, the arrest may be justified on the ground that Costa had reasonable grounds to believe that DiBella had committed a narcotics violation.

In *Williams v. United States*, 273 F. 2d 781, the arrest was made upon a warrant of arrest which the Court held to be invalid. However, the arrest was justified on the basis of the arresting officer having reasonable grounds to believe a violation had been committed.

In *Giordenello v. United States*, *supra*, the Supreme Court held that the warrant of arrest was invalid. The case points out, however, that in the Supreme Court, for the first time, the Government contended that the arrest could be justified without a warrant on the basis that there was probable cause to believe that the person arrested had committed a felony. The Supreme Court held that these con-[fol. 106a] tentions by the Government, having been made for the first time before that Court, were belated, and re-

fused to consider them. The case was reversed, but the Supreme Court stated:

"This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying upon the warrant."

The arrest of DiBella by Costa, who, on March 9, 1959, had reasonable grounds to believe DiBella had committed a violation of the narcotics law, was a lawful arrest. The arrest being lawful, a reasonable search of appellant's premises, such as shown in this case, was proper. *United States v. Rabinowitz*, 339 U. S. 56.

Judgment affirmed.

WATERMAN, *Circuit Judge* (dissenting):

I concur in the holding that, inasmuch as the motion was made prior to indictment, the denial of the motion to suppress is an appealable order. I also agree with my colleagues that the warrant of arrest is invalid under *Giordenello v. United States*, 357 U. S. 480 (1958) and earlier cases. However, I am unconvinced that Agent Costa had "reasonable grounds" for arresting DiBella without possessing a valid warrant for his arrest. Therefore, I would hold that the subsequent search of the DiBella home cannot be justified as incidental to DiBella's lawful arrest. Moreover, even assuming *arguendo* that the arrest was a lawful one, I disagree with the conclusion the majority reach that the subsequent search is justifiable as incidental to the arrest.

As the majority opinion sets forth, the "reasonable grounds" contemplated by the Narcotics Control Act, 26 [fol. 107a] U. S. C. §7607, are equivalent to the "probable cause" required under the Fourth Amendment, *Draper v. United States*, 358 U. S. 307 (1959), and the quantity and quality of the evidence to substantiate "probable cause" need not be as great as that required for a determination of guilt. *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725 (1960); *Henry v. United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Draper v. United States*, *supra*, *Brinegar v.*

United States, 358 U. S. 160 (1949); *Carroll v. United States*, 267 U. S. 132 (1925).

In determining whether a law enforcement officer had "reasonable grounds" (i.e. "probable cause") to act as he did, we should approach a resolution of the issues in the light of the historical interpretation this language of the Fourth Amendment has been accorded in the past. And, of course, we should look at the occurrence we are examining with the greater particularity when, as here, the officer, unprotected by a prior valid judicial act, invades a family's permanent domicile in the night-time.

The latest of the several Supreme Court summaries setting forth the philosophy underlying the meaning of "upon probable cause" and an historical exemplification of that philosophy appears in *Henry v. U. S.*, *supra*. There Justice Douglas states, 361 U. S. 98, 101, 80 S. Ct. 168, 170:

And as the early American decisions both before and immediately after its [the Fourth Amendment] adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day . . . [citing cases]. Its highwater was *Johnson v. United States*, *supra* [333 U. S. 10 (1948)], where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.

[fol. 108a] There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without an arrest warrant, or approved a search without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the instant case.

The *Carroll* and *Brinegar* cases, *supra*, dealt with violations of the federal liquor laws. Defendants in each case were arrested on the open road while transporting liquor. In each case the arresting officer had observed the defendant at some length and could attest personally to the defendant's having handled liquor. Defendants in *Carroll* had offered the officer alcohol on a previous occasion.

Brinegar previously had been arrested by the same officer for illegally transporting liquor, and in the six months preceding the arrest at issue that officer had twice seen the defendant loading liquor into a car or truck.

Draper v. United States, supra, dealt with the specific section of the Narcotics Control Act here involved. There the arresting officer had information from a paid "special employee" of the Bureau of Narcotics that Draper was peddling narcotics and would arrive in Denver by train carrying a shipment of narcotics. Draper was arrested as he alighted from the train.

In *Jones v. United States, supra*, the question of whether the magistrate who issued a warrant had sufficient competent evidence before him in the officer's affidavit to justify issuance was decided favorably to the Government. Probable cause was there found because the officer's affidavit not only set forth information given by an unnamed informer but also stated that the officer personally knew the persons informed upon, and knew they were narcotics users. Furthermore, the informer had given reliable information in the past and the information given this time was corroborated by other informants. See 362-U. S. 267, fn. 2, 80 S. Ct. 734, fn. 2.

What evidence is offered in this case to justify a judicial finding that Agent Costa had "reasonable grounds" (i.e., "probable cause") to arrest DiBella without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958 a defective arrest warrant was issued. On March 9, 1959 DiBella was arrested by three agents in the evening as he was sitting in his living room. It is claimed that during this five months' period the agents were awaiting expected additional violations, but Agent

Costa could not point to a single incident in that five months' period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant.

Draper, Brinegar and Carroll were arrested when there was a real need for rapid action but even in those cases more evidence justifying arrest was introduced than here. In *Brinegar* and *Carroll* additional evidence was compiled during the period of surveillance. Here no such evidence was accumulated, and the informer Panzarella was something less than the trustworthy "special employee" in *Draper*. This case is perhaps closest to *Jones*, but even there more corroborating evidence was introduced, and the initial invasion of the privacy of the apartment where [fol. 110a] Jones was discovered was pursuant to a valid search warrant issued by "an independent judicial officer."

It is interesting to compare the facts in the instant case with those in *Henry v. United States, supra*, in which the Supreme Court refused to find probable cause. In *Henry* the arrest followed surveillance by two FBI officers. Henry and a confederate had been seen making two trips transporting cartons in an automobile from a residential section of the city to a tavern. The FBI had developed an interest in Henry because the confederate had been "implicated in interstate shipments" and in that area there had been some whiskey stolen from an interstate shipment. Henry and his confederate were stopped during the second trip and were found to be carrying stolen radios in their car. The Supreme Court reasoned that using an auto to transport small cartons was an outwardly innocent activity, and the FBI agents could not rely in justification for their acts upon an informer's story to them that Henry's confederate was implicated in a former theft of an interstate shipment. DiBella's two meetings with Panzarella were to all outward appearances a more innocent association than the two trips Henry and his confederate were making. No invasion of one's domicile was involved in *Henry*, and the Court recognized that "*Carroll v. United States, supra*, liberalized the rule governing searches when a moving vehicle is involved." But even under these circum-

stances the Court went on to say, "But that decision [Carroll] merely relaxed the requirements for a warrant on grounds of *practicality*. It did not dispense with the need for probable cause." (Emphasis supplied.) 361 U. S. 98, 104, 80 S. Ct. 168, 172. Accord, *Rios v. United States*, 364 U. S. 253, 80 S. Ct. 143 (1960). See *Eng Fung Jem v. United States*, 281 F. 2d 803 (9 Cir. 1960). Moreover, in cases where arrests without warrant have been sought to be justified as having been made upon probable cause the [fol. 111a] courts of appeal have felt constrained to discover special circumstances to justify the arrests. See *United States v. Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States v. Volkell*, 251 F. 2d 333, 336 (2 Cir.), *cert. denied*, 356 U. S. 962 (1958); *United States v. Walker*, 246 F. 2d 519, 527 (7 Cir. 1957). See also *Williams v. United States*, 273 F. 2d 781, 791 (9 Cir.), *cert. denied*, 362 U. S. 951 (1960) (informer was paid employee), relied on by the majority here.

The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority holding here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed. *United States v. Joines*, 258 F. 2d 471 (3 Cir.), *cert. denied*, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest. See *United States v. Joines*, *supra* (21 days); *Seymour v. United States*, 177 F. 2d 732 (D. C. Cir. 1949) (6 days); *State v.*

Kopelow, 126 Me. 384, 138 Atl. 625 (1927) (7 days); *State v. Nadeau*, 97 Me. 275, 54 Atl. 725 (1903) (23 days); *Kent v. Miles*, 69 Vt. 379, 37 Atl. 1115 (1897) (17 days).] The [fol. 112a] permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey v. United States*, 261 F. 2d 870, 872 (5 Cir. 1958), *cert. denied*, 359 U. S. 969 (1959), the court stating that the arresting officer "may defer the arrest for a day, a week, two weeks, or perhaps longer." Surely in the present case where no new evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale "probable cause." I would hold that the arrest of a person who has been under surveillance for seven months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale.

However, assuming that the officers had probable cause to arrest DiBella the search of his home cannot even then be justified. The mere fact that a search immediately follows a valid arrest does not conclusively establish the reasonableness of that search. *Abel v. United States*, 362 U. S. 217, 235, 80 S. Ct. 683, 695 (1960); *United States v. Rabinowitz*, 339 U. S. 56, 65-66 (1950). See *Rios v. United States*, *supra*, at 261, 80 S. Ct. at 1436. A long and inconsistent series of cases has attempted to define the permissive area of a valid search incidental to an arrest. But as Justice Frankfurter pointed out this year in *Abel*:

[fol. 113a] The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluc-

tuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare *Marron v. United States*, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, with *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374, and *United States v. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, compare *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris v. United States*, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399, and *United States v. Rabinowitz*, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; compare also *Harris*, *supra*, with *Trupiano v. United States*, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests. 362 U. S. at 235, 80 S. Ct. at 695.

Although Justice Frankfurter, in *Abel*, was unwilling to attempt a reconciliation of the cases, he had on two prior occasions analyzed in detail the decisions involving searches and seizures incidental to arrests. *Harris v. United States*, 331 U. S. 145, 155-183 (1947) (dissent); *United States v. Rabinowitz*, *supra*, at 68-86 (dissent). From his analysis we can discern a pattern that has eroded the homeowner's right to personal privacy in his dwelling to the point where it would seem that the entire home is subject to search by the police if armed with a valid warrant for the homeowner's arrest. *Harris v. United States*, *supra*. *Trupiano v. United States*, *supra*, restricted *Harris* by pointing out that such a broad search without a search warrant could only be condoned as incidental to a lawful arrest where [fol. 114a] there was a practical necessity for speed. The need for this showing was later rejected in *United States v. Rabinowitz*, *supra*. Therefore, now, as a result of this steady erosion, on the authority of *Harris*, as resurrected by *Rabinowitz*, a prisoner's apartment may be lawfully searched without a search warrant as incidental to his lawful arrest, unless the prisoner's situation is meaningfully distinguishable from that present in those cases.

Two factors distinguish the instant case. First, in *Harris* and *Rabinowitz* a valid warrant of arrest had been issued. Thus there had been a proper decision by a disinterested magistrate that probable cause of guilt existed. No valid warrant issued here. There is no Supreme Court case upholding the officers' acts where a home was searched by officers armed with neither an arrest warrant nor a search warrant. *Draper v. United States*, *supra*, involved the search of a prisoner's person; *Brinegar* and *Carroll* the search of the prisoners' automobiles. It is certainly clear that "There is a vast difference between entering and searching homes or even hotel rooms which are fixed and more or less permanent locations and stopping a person or car on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear." *United States v. Kancso*, 252 F. 2d 220, 223 (2 Cir. 1958).

As Justice Douglas speaking for the Court has said:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the [fol. 115a] law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *McDonald v. United States*, 335 U. S. 451, 455-56 (1958).

Second, in further contrast to *Harris* and *Rabinowitz*, DiBella's arrest and the subsequent search of his residence occurred in the night-time. Rule 41(c) of the Federal Rules of Criminal Procedure provides that a search warrant shall be restricted to daytime execution unless the affidavit indicates positively that the objects to be searched are upon the premises. See also *Distefano v. United States*, 58 F. 2d 963 (5 Cir. 1932). In *Jones v. United States*, 357 U. S. 493, 498-499 (1958), the Supreme Court stated, by Justice Harlan, that the provisions relative to night-time search in Rule 41(c) are "hardly compatible with a principle that a search without a warrant can be based merely upon probable cause." To be sure, the probable cause the Court was there discussing was probable cause for the existence of objects of seizure rather than probable cause to justify an arrest. But I see no difference in principle between the two situations.

Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*, but is amplifying and extending the doctrine of those cases. Furthermore, the fact that the search uncovered narcotics cannot change [fol. 116a] the result, for "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948). Nor do I find persuasive the argument that such searches are necessary for the effective control of narcotics traffic, Justice Jackson, speaking for the Court, disposed of this argument in *United States v. Di Re*, *supra*, at 595:

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

And as Justice Douglas said in his dissent in *Draper v. United States*, *supra*, at 314-15:

Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer on which the present arrest [fol. 117a] was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis of an exhaustive search of appellant's home.¹ To condone such activity "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest." *United States v. Rabinowitz*, *supra*, at 80 (Frankfurter, J., dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents.

¹ There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant.

[fol. 118a]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Leonard P.
Moore, Hon. Oliver D. Hamlin, Jr., Circuit Judges.

In the Matter of the Application of
MARIO DiBELLA, Appellant.

JUDGMENT—November 23, 1960

Appeal from the United States District Court for the
Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed.

[fol. 119a] [File endorsement omitted]

[fol. 120a] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 121a]

SUPREME COURT OF THE UNITED STATES

No. 574, October Term, 1960

MARIO DiBELLA, Petitioner,

VS.

UNITED STATES.

ORDER ALLOWING CERTIORARI—February 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.

FILED

DEC 9 1960

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

October Term, 1960

No. ~~571~~ 2

MARIO DEBELLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

JEROME LEWIS

Attorney for Petitioner

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IN THE
Supreme Court of the United States

October Term, 1960

No.

MARIO DiBELLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioner, Mario DiBella, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on November 23, 1960, affirming an order of District Judge Leo F. Rayfiel of the United States District Court for the Eastern District of New York, denying petitioner's motion for an order of suppression pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure.

Opinions Below

The opinion of the District Court denying petitioner's motion to suppress on the grounds of an unlawful search and seizure is reported in 178 F. Supp. 5; it appears as Appendix A in this petition, *infra*, pp. 21-30. The District

Court wrote no other opinion. The opinion of the Court of Appeals affirming the denial of the motion to suppress has not yet been reported; it appears as Appendix B to this petition, *infra*, pages 31-45).

Jurisdiction

The judgment of the Court of Appeals was entered on November 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a narcotics agent may enter a suspect's dwelling in the nighttime without a search warrant or a valid warrant of arrest and search the premises.
2. Whether a nighttime entry into a dwelling to arrest a person upon probable cause that he had committed a felony under circumstances where a warrant could have been sought is consistent with the Fourth Amendment.
3. Whether a narcotics agent who makes an arrest under an invalid warrant can subsequently justify the arrest by recourse to the Narcotics Control Act.
4. Since probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant, may a narcotics agent enter a suspect's home in the nighttime and make an arrest on probable cause that a crime has been committed and then as an incident thereto make a search of the dwelling.
5. Whether under the Narcotics Control Act an agent may enter a suspect's home in the nighttime, make an arrest

and a search as an incident thereto in the absence of special circumstances.

6. Where an application for a search warrant has been denied by a United States Commissioner and an invalid warrant of arrest executed is not a search as an incident thereto in violation of the Fourth Amendment.

7. Whether reasonable grounds exist for a nighttime arrest of a suspect in his dwelling when said arrest is made seven months after the alleged commission of the crime.

8. Whether reasonable grounds for a nighttime arrest under the Narcotics Control Act can be predicated upon a hearsay statement made by a narcotics agent to the arresting narcotic agent.

9. Does not a complete untrammelled action on the part of a narcotics agent under the Narcotics Control Act violate the Fourth Amendment.

10. In the absence of proof that the petitioner might flee before a warrant could be obtained was not his arrest and the subsequent search of his apartment a violation of of the Fourth Amendment.

11. Whether the petitioner's arrest was made as a pretext to search his apartment for evidence of contraband.

12. Does the mere fact that an immediate search follows the arrest conclusively establish the reasonableness of the search.

Constitutional Provisions and Statute Involved

The constitutional provision involved is the Fourth Amendment.

The following provisions of 26 U.S.C. Sec. 7607, which states that, among others, agents of the Bureau of Narcotics may:

- “(2) Make arrests without warrants for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marijuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.”

Statement of the Case

On October 6, 1958, Federal Narcotic Agents Costa and Moynihan presented to United States Commissioner Abruzzo their sworn affidavits to obtain a warrant to search the petitioner's apartment (25a-31a).^{*} Commissioner Abruzzo denied the application (51a-52a). On October 15, 1958, Agent Costa presented a complaint praying for the arrest of the petitioner, to United States Commissioner Epstein in the Eastern District of New York (7a). Upon the basis of this complaint, Commissioner Epstein issued a warrant of arrest (21a, 22a).

On March 9, 1959, narcotic agents saw petitioner sitting in the living room of his apartment. At 8:15 p.m. Agent Costa with the warrant of arrest in his possession, went with other agents to the petitioner's apartment. It was nighttime. The agents rang the bell and the door was opened by petitioner's stepdaughter. The agents identified themselves, showed her their credentials, walked into the living room, where they identified themselves to petitioner. Agent Costa showed petitioner a copy of the warrant of

^{*} Page numbers in parenthesis refer to printed appendix.

arrest, and placed him under arrest. An examination of the apartment revealed the presence of narcotics (5a, 33a-34a). Agent Costa filed his return in the Clerk's office in the United States District Court indicating that he had arrested the petitioner on March 9, 1959 pursuant to the warrant of arrest issued by Commissioner Epstein (21a-23a). Both the majority and minority opinions in the Court below held that the warrant of arrest was invalid (Appendix B, *infra*, pp. 36, 46).

Appellant was arraigned before a United States Commissioner for the Eastern District of New York on March 10, 1959, and bail was fixed (23a-24a).

A motion was made prior to the filing of an indictment to suppress the items seized by the agents on March 9, 1959, on the ground that the seizure was illegal and the search unlawful in violation of the Fourth Amendment and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure (3a-4a).

This motion to suppress was argued before District Judge Rayfiel on August 25, 1959. At the conclusion of the oral argument, Judge Rayfiel reserved decision and directed that all papers be served and filed by September-11, 1959 (80a).

On November 4, 1959, the District Judge denied the motion in all respects, without prejudice, to a renewal thereof on the trial. The order denying the motion was signed on November 30, 1959. Petitioner filed his notice of appeal on December 3, 1959 (89a, 91a, 92a).

The appeal was heard on June 14, 1960, before a panel of the Court of Appeals consisting of Judges Waterman, Moore and Hamlin (the latter, a Judge of the Ninth Cir-

cuit, sitting pursuant to statutory designation). On November 23, 1960, the Court handed down its judgment of affirmance with Judge Waterman dissenting (Appendix B, *infra*, pp. 45, 58).

Reasons for Granting the Writ

This case presents questions, never before submitted to this Court, whose resolution is vital to the administration of justice in the Federal courts. Of primary significance are the questions as to the scope of the Narcotics Control Act and its relationship to the Fourth Amendment. There is no Supreme Court case upholding an officer's acts, where a home was searched by the officers armed with neither an arrest warrant nor a search warrant (Appendix B, *infra*, p. 55).

The disagreement in the Court of Appeals in the consideration of these issues is reflected in the vigorous dissent of Judge Waterman (Appendix B, *infra*, pp. 46-58).

1. There is first the extremely important question whether narcotic agents may enter a suspect's home in the night time without a search warrant or a valid warrant of arrest and search the premises. In regards to this vital issue, Judge Waterman in his dissenting opinion said (Appendix B, *infra*, pp. 54-56).

"Two factors distinguish the instant case. First, in *Harris* (*Harris v. United States*, 331 U. S. 145) and *Rabinowitz* (*United States v. Rabinowitz*, 339 U. S. 56, 65-66) a valid warrant of arrest had been issued. Thus there had been a proper decision by a disinterested magistrate that probable cause of guilt existed. There is no Supreme Court case upholding the officer's acts where a home was searched

by officers armed with neither an arrest warrant nor a search warrant. *Draper v. United States*, supra, involved the search of a prisoner's person; *Brinegar and Carroll* the search of the prisoners' automobiles. It is certainly clear that, 'There is a vast difference between entering and searching homes or even hotel rooms which are fixed and more or less permanent locations and stopping a person or car on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear.' *United States v. Kaneso*, 252 F. 2d 220, 223 (2 Cir. 1958). Citing Justice Douglas in *McDonald v. United States*, 335 U. S. 451, 455-456. * * *

Second, in further contrast to *Harris* and *Rabinowitz*, *DiBella's* arrest and the subsequent search of his residence occurred in the night-time. Rule 41 (c) of the Federal Rules of Criminal Procedure provides that a search warrant shall be restricted to day-time execution unless the affidavit indicates positively that the objects to be seized are upon the premises. See also *Distefano v. United States*, 58 F. 2d 963 (5 Cir. 1932). In *Jones v. United States*, 357 U. S. 493, 498-499 (1958), the Supreme Court stated, by Justice Harlan, that the provisions relative to night-time search in Rule 41 (c) are 'hardly compatible with a principle that a search without a warrant can be based merely upon probable cause.' To be sure, the probable cause the Court was there discussing was probable cause for the existence of objects of seizure rather than probable cause to justify an arrest. But I see no difference in principle between the two situations.

Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*,

but is amplifying and extending the doctrine of those cases " . . . " .

The majority opinion in the court below has over-extended the principle of law that a search may be made as an incident to a warrantless arrest. In *United States v. Harris, supra*, and *United States v. Rabinowitz, supra*, the searches were made as an incident to a valid warrant of arrest. In the instant case, the search was made as an incident to an invalid warrant of arrest. *Harris* and *Rabinowitz* therefore do not apply to the facts in our case. The Court of Appeals held that since Agent Costa had reasonable grounds to believe that the petitioner had committed a narcotics crime in August and September 1958, his arrest of petitioner in the night-time in his apartment on March 9, 1959 was lawful, therefore, a search of petitioner's apartment was proper, citing *United States v. Rabinowitz, supra* (Appendix B, *infra*, p. 45).

There was no evidence presented to the District Judge why the petitioner who had been under surveillance by the Agents for seven months was visited by agents in his apartment and arrested. Neither the affidavit of the Assistant United States Attorney nor the affidavits of Agents Costa and Moynihan reflected any reasons for the sudden arrest of petitioner (8a-20a, 25a-31a).

Parenthetically, it should be noted that the Agents' affidavits were executed on October 6, 1958 (27a-31a). These affidavits obviously could not reflect what transpired on March 9, 1959. There was nothing before the District Judge to indicate a vital necessity to enter petitioner's apartment and arrest him. Affidavits executed five months

prior to the arrest were utilized by the District Judge in finding that reasonable grounds existed to arrest petitioner (Appendix A, *infra*, pp. 23, 26).

Reasonable grounds for an arrest under the Narcotics Control Act are equivalent to the probable cause required under the Fourth Amendment, *Draper v. United States*, 358 U. S. 307. Various Courts of Appeals in cases where arrests without warrants have been sought to be justified as having been made upon probable cause have felt constrained to discover special circumstances, to wit: that the suspect would flee before the warrant could be obtained; that the contraband would be either destroyed or removed before the obtainance of a warrant, to justify the arrests. *United States v. Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States v. Volkell*, 251 F. 2d 333, 336 (2 Cir.) cert. denied, 356 U. S. 962 (1958); *United States v. Walker*, 246 F. 2d 519, 527 (7 Cir. 1957).

Special circumstances to justify the arrest are not present in the instant case. An application for a search warrant had previously been denied (51a-52a). An invalid warrant of arrest had been issued (Appendix B, *infra*, p. 36). To justify the search and seizure herein would be to circumvent the Fourth Amendment and allow the Narcotics Control Act to transcend the Constitution. It would permit narcotic agents to by-pass the Fourth Amendment with impunity. The United States Commissioner would be evicted from his judicial function. The narcotics agent would in effect be the judge of the existence of probable cause; the officer making the arrest and as an incident thereto searching a suspect's apartment whenever he so desired irrespective of the time of day. This would be a very dangerous amalgamation of powers.

The illegal arrest of the appellant in the privacy of his apartment on an invalid warrant of arrest should not be metamorphosed into a valid arrest under the Narcotics Control Act. This act cannot take away the safeguards embodied in the Fourth Amendment.

It was said in *Nathanson v. United States*, 290 U. S. 41 on page 47:

"The Amendment (4th) applies to warrants under any statute, revenue, tariff and all others. No warrant inhibited by it, can be made effective by any act of Congress or otherwise".

It is petitioner's contention that the Government must not only prove that an agent had reasonable grounds to arrest a suspect in his dwelling but in addition must prove that the agent had reasonable grounds to enter the dwelling.

Implicit in the establishment of reasonableness is the *sine qua non* of good faith. Agent Costa had in his possession the warrant of arrest for five months before he executed it. There were no special or unusual circumstances present to justify the agents entering petitioner's apartment in the nighttime. Such an entry was an act of bad faith on the part of the agents and a subterfuge to search the apartment.

See: Harvard Law Review,—Vol. 74, p. 158. As Judge Waterman stated, Appendix B. *infra*, p. 58.

"Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis

of an exhaustive search of appellant's home.¹ To condone such activity 'is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.' *United States v. Rabinowitz*, supra, at 80 (Frankfurter, J., dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents''.

¹ There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant.

In order to justify the entrance into petitioner's apartment, the Government had the burden of proving the necessity for such entry. Particularly is this so when it is a night-time entry. The fact that subsequent to petitioner's arrest, the agents found narcotics in his apartment does not justify the arrest.

An arrest is not justified by what a subsequent search discloses.

Henry v. United States, 361 U. S. 98.

The Government failed to sustain its burden because it did not submit any proof from any of its agents to explain or justify their night-time entry into petitioner's apartment.

2. In the face of the denial of a search warrant by Commissioner Abruzzo and the arrest of petitioner under an invalid warrant, the Government's contention that the agents had the right to enter petitioner's apartment in the night-time, arrest him pursuant to the Narcotics Control Act and thereafter make a search as an incident thereto, should not be countenanced.

It is undisputed that Agent Costa arrested petitioner by virtue of the invalid warrant in his possession (21a-22a, 76a). He did not arrest petitioner under the Narcotics Control Act. He was thinking solely in terms of exercising the authority vested in him because of the said warrant. He never exercised any judgment as to "reasonable ground" (i.e. "probable cause"). Since arrest on probable cause assumes such an exercise of judgment, the Government is in no position to justify an arrest without a warrant, where the arresting officer considered nothing other than his power to execute the warrant of arrest.

It is apparent that the thought of arresting petitioner without a warrant by recourse to the Narcotics Control Act, never entered the minds of the arresting agents. This theory advanced for the first time on the argument of the motion to suppress was a figment of the mental creativeness of the United States Attorney.

Giordenello v. United States, 357 U. S. 480.

3. Probable cause for belief that certain articles are in a dwelling cannot of itself justify a search without a warrant.

Agnello v. United States, 269 U. S. 20.

A fortiori, probable cause to justify the arrest of a suspect in his dwelling, in the night-time, and to make a search as an incident thereto, should have no greater validity than the exercise of probable cause in searching an apartment without a warrant.

As was said by Justice Harlan in *Jones v. United States*, 357 U. S. 493, 498-499, that the provisions relative to night-time search in Rule 41 (c) are "hardly compatible with a principle that a search without a warrant can be based merely upon probable cause".

4. Reasonable grounds as contemplated by the Narcotics Control Act did not exist for the arrest of petitioner on March 9, 1959.

Judge Waterman in expressing his belief that "reasonable grounds" (i.e. "probable cause") did not exist said (Appendix B, *infra*, p. 47).

"There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the present case . . .

What evidence is offered in this case to justify a judicial finding that Agent Costa has 'reasonable grounds' (i.e. 'probable cause') to arrest DiBella without a warrant? Agent Costa had been told a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did

not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958, a defective warrant was issued. On March 9, 1959, DiBella was arrested by the agents in the evening as he was sitting in his living room. It is claimed that during this five months period the agents were awaiting expected additional violations, but Agent Costa could not point to a single incident in that five months period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant (Id. 49) * * *

The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed. *United States v. Joines*, 258 F. 2d 471 (3 Cir.), cert. denied, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far, no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the

warrant where there has been opportunity in the meantime to make the arrest. (Id. 51, 52, citing cases). . . .

The permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey v. United States*, 261 F. 2d 870, 872 (5 Cir. 1958) cert. denied, 359 U. S. 969 (1959), the court stating that the arresting officer 'may defer the arrest for a day, a week, two weeks, or perhaps longer.' Surely in the present case where no evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale 'probable cause'. I would hold that the arrest of a person who has been under surveillance for seven months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale" (Id. 52, 53).

The majority opinion in holding that Agent Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics law rely upon *Jones v. United States*, 362 U. S. 257, 259 (Appendix B, *infra*, p. 43).

However, there are many areas of difference between *Jones v. United States*, *supra*, and the instant case.

In the *Jones* case we find in the affidavit of Detective Didone seeking a search warrant, the following:

1. Detective Didone received information that Cecil Jones and Earline Richardson were involved in narcotics.
2. That they kept a ready supply of heroin in their apartment.
3. The informant mentioned that the narcotics were either on their person, under a pillow, on a dresser, or on a window ledge in said apartment.
- 7 4. The informant stated that on many occasions he had purchased drugs from Jones and Richardson in their apartment.
5. Jones and Richardson were familiar to the Detective and other members of the Narcotics Squad.
6. Jones and Richardson were narcotic addicts.
7. The same information regarding the illicit narcotic traffic conducted by Jones and Richardson had been given to Didone by other sources of information.
8. The informant had given Didone correct information on other occasions.

In our case, we find:

- a. That in August 1958, Agent Costa saw DiBella leave his premises, enter his car, drive to 37th Avenue and 79th Street, Jackson Heights, Queens, New York, where DiBella met Panzarella. Panzarella entered the automobile and was driven to Roosevelt Avenue and 79th Street in Jackson Heights, Queens. Panzarella left the car and later met Agent Moynihan and gave the agent an envelope containing heroin.
- b. The same procedure was followed in September, 1958.

- c. Agent Costa, the arresting officer had been told of a statement made by Panzarella, to his fellow-agent Moynihan (who was not present at the time of petitioner's arrest), that DiBella was Panzarella's source of supply.
- d. Costa did not observe any transfer of anything between DiBella and Panzarella.
- e. Panzarella had not given Moynihan or Costa correct information on other occasions.
- f. Similar information that DiBella was a supplier of narcotics had not been given to Moynihan or Costa by other sources of information.
- g. DiBella was not a narcotic addict.

In *Draper v. United States*, 358 U. S. 307 and in *Jones v. United States*, *supra*, the information given to the officers came from a reliable informant. In the present case there was no proof that Panzarella's information could be relied upon and that based on previous dealings he was a reliable informant.

In *Jones v. United States*, 266 F. 2d 924, 929 (D. C. Cir.), the court said on page 929:

"The requirement that the informer be reliable stands as the only effective legal safeguard against false denunciations by irresponsible persons who may be motivated by self-interest, spite or even paranoia. The only other safeguard which remains rests not on law but on the good will of the police officer."

In *Jones v. United States*, *supra*, on page 271, Justice Frankfurter stated:

" * * * Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously give accurate information. This story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history."

In our case, there was no proof that DiBella was a user of narcotics. There was no corroboration through other sources of information. The only proof adduced by the Government to corroborate Moynihan's statement to Costa, were the two observations made by Costa when he had seen DiBella and Panzarella meet. Certainly DiBella's two meetings with Panzarella were to all outside appearances a more innocent association than the two trips Henry and his confederate made in *Henry v. United States*, 361 U. S. 98.

See: Dissenting opinion of Judge Waterman (Appendix B, *infra* pp. 50, 51).

In the *Jones* and *Draper* cases, the information was given by a reliable informant directly to the arresting officer. In the present case, the information was alleged to have been given by Panzarella to Moynihan who then re-

lated it to Costa. This would be hearsay upon hearsay and an unwarranted extension of the rule that hearsay may be the basis for a warrant if reasonably substantiated.

However, this hearsay upon hearsay statement of Moynihan to Costa was not reasonably corroborated. It did not create sufficient probable cause for a search warrant. Undoubtedly, that is the reason why Commissioner Abruzzo denied the application for a search warrant (51a-52a). Since there was not sufficient probable cause for a search warrant, there could not be sufficient probable cause for the warrantless arrest of the petitioner.

5. The arrest of the petitioner was but a pretext to search his apartment. The warrant to arrest petitioner was issued on October 15, 1958. It was executed on March 9, 1959 (21a-22a). It is evident that petitioner could have been arrested at anytime after the issuance of the warrant. No proof was offered by the Government to explain why they entered petitioner's apartment, in the night-time to make the arrest.

As Judge Waterman stated (Appendix B, *infra*, p. 58 postscript):

" * * * I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant."

In *Jones v. United States*, 357 U. S. 493, on page 500, Justice Harlan stated:

" * * * The testimony of the federal officers make clear beyond dispute that their purpose in entering

was to search for distilling equipment, and not to arrest petitioner. Since the evidence obtained through this unlawful search was admitted at the trial, the judgment of the Court of Appeals must be reversed."

In *Worthington v. United States*, 166 F. 2d 566 (6 Cir.), Judge McAllister said:

"All the circumstances disclose that the arrest was made as a pretext to search for evidence, and on that ground alone, the evidence should have been suppressed."

See:

United States v. Lefkowitz, 285 U. S. 452.

CONCLUSION

This case presents important questions in the administration of criminal justice, more particularly a defendant's standing to challenge the legality of a search in the circumstances of this case. The decision below radically impairs and whittles away rights guaranteed under the Fourth Amendment. The relationship of the Narcotics Control Act as it impinges upon the Fourth Amendment has never been decided by this Court. The question whether a narcotics agent may enter a suspect's dwelling in the night-time without a search warrant or a valid warrant of arrest and search the premises has not previously been presented to this Court, and should be settled by it.

Respectfully submitted,

JEROME LEWIS

Attorney for Petitioner

APPENDIX A**Opinion of United States District Court****UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK****Misc. 2225**

[SAME TITLE]

Appearances:

JEROME LEWIS, Esq.,
Attorney for defendant Mario DiBella,
For the Motion.

HON. CORNELIUS W. WICKERSHAM, JR.,
United States Attorney.

By CHARLES L. STEWART, Esq.,
Assistant United States Attorney.
In Opposition.

RAYFIEL, J.

The defendant, Mario DiBella moves under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress all evidence seized in his apartment at 35-15 80th Street, Jackson Heights, Queens County, New York, on March 9, 1959 by agents of the Federal Bureau of Narcotics, as well as any and all evidence gleaned herefrom, on the ground that the search and seizure was unlawful, being violative of the Fourth Amendment of the Constitution of the United States and of Rules 3 and 4 of said Rules.

The defendant bases his motion on the following three grounds:

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1. that the warrant of arrest was invalid because the complaint on which it was based did not state facts sufficient to show probable cause;

2. that this arrest under said warrant was used as a pretext to make an exploratory search of the defendant's apartment; and

3. that the warrant was invalid because it bore the date October 6th, 1958, while the complaint on which it was based was dated October 15th, 1958.

As to the third ground, it is palpable that the error in date was inadvertent. Both the warrant and the complaint on which it was based, were *originally* dated October 6th, 1958. The date on the complaint was changed in ink to October 15th, 1958 when it was sworn to before Commissioner Epstein. The date on the warrant, however, was not changed and was thus signed by the Commissioner. This was clearly an oversight and should and does not affect the validity of the warrant, which obviously, was issued on October 15th, 1958. As a matter of fact defendant's counsel, in the statement of undisputed facts contained in his brief, alleges "1. That on the 15th day of October, 1958 a warrant was issued . . ." (Emphasis supplied.)

As to the failure of the complaint to state facts showing *probable cause*.

The complaint alleges on *information and belief* that "the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: ap-

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proximately one ounce of heroin hydrochloride, a derivative of opium. . . .”

The following paragraph states “That the source of your deponent’s information and the grounds for his belief are *your deponent’s personal observations in this case*, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics.” (Emphasis added.)

Doubtless the complaint was inexpertly drawn. It alleges, *on information and belief*, that the sale of the heroin took place on September 10th, 1958, and then goes on to say that the *source* of the complainant’s information and *grounds* for his belief are, among other things, *his own observations*. Obviously, if the sources of his information were his own observations, then he had *personal knowledge* of the facts.

I have read the statements of Agents Costa and Moynihan which are set forth in Appendix B and C, attached to the affidavit submitted in opposition to this motion by Assistant United States Attorney Charles L. Stewart. These statements were originally attached to an application for a search warrant made before Commissioner Abruzzo, who denied the same. I have considered them as having been submitted in opposition to this motion.

Agent Moynahan’s statement alleges that he had met one Samuel Panzarella, a co-defendant of DiBella, who offered to sell him heroin, the sale to take place at 8:00 A.M. on August 26, 1958; that he met Panzarella in Manhattan at 6:00 A.M. on that day and was told by him that he wanted to call his source of supply, whereupon Panzarella made a telephone call, after which he and the agent drove to 79th

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Street, north of Roosevelt Avenue, in Jackson Heights, Queens, New York, where they parked; that Panzarella then left the vehicle, walked to 79th Street and 37th Avenue, and entered a green Chrysler automobile bearing New York license number 6971 N E; that he observed Panzarella leave that vehicle several minutes later at 79th Street and Roosevelt Avenue and return to the car in which he, the agent, was waiting, after which Panzarella handed him a glassine envelope containing a white powder, which subsequent tests proved to be an ounce of heroin hydrochloride. That on September 10th, 1958 a similar series of events occurred: at 9:30 P.M. on that day he met Panzarella in Manhattan, was told by him that he would have to go to Jackson Heights to meet his source of supply, and after Panzarella made a telephone call they both went to 74th Street and Roosevelt Avenue; Panzarella then left the agent, met the defendant Mario DiBella, walked with him from 74th Street to 37th Road and then returned to the agent; they both drove back to Manhattan, and enroute Panzarella handed him a glassine envelope containing heroin hydrochloride, and stated to him that DiBella was his source of supply and had supplied the heroin which has been sold to the agent on August 26th, 1958 and September 10th, 1958.

Agent Costa's affidavit alleges that on August 26th, 1958, at 7:30 A.M. he saw the defendant Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, enter his Chrysler automobile, license number 6971 N E, drive to 37th Avenue and 79th Street where he met Panzarella, who entered the car, and DiBella then drove to Roosevelt Avenue and 79th Street, where Panzarella left the car and walked to 78th Street, where he met Agent Moynihan, to

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whom he handed a small envelope the contents of which later tests showed to be heroin hydrochloride; that at 11:00 P.M. on September 10th, 1958 he observed DiBella leave Apartment 42 at 35-15 80th Street, Jackson Heights, walk to Roosevelt Avenue and 74th Street, where he met Panzarella, and then walked with him to 76th Street near Roosevelt Avenue, where they separated, after which Panzarella met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he stated he had obtained from DiBella.

It is evident from these statements that Agent Costa had personal knowledge of the events which led to DiBella's arrest. He so stated in the affidavit which he submitted in support of the application for the warrant which was issued by Commissioner Epstein on October 15th, 1958 and executed on March 9th, 1959.

The facts in this case are infinitely stronger than those in *Giordenello v. United States*, 357 U. S. 480, cited by the defendant in his brief. There the names of the witnesses were left blank in the complaint on which the warrant was issued, and the agent testified that when the warrant was issued "his suspicions of the petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits" (p. 485). The Supreme Court there held that this complaint was "defective in not providing a sufficient basis upon which a finding of probable cause could be made."

In the case at bar Agent Costa had had the defendant under observation. He saw him meet Panzarella on two occasions, after which the latter made sales of heroin to

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Agent Moynihan. The complaint names Panzarella as a person who made statements in the case, and alleges that the sources of the agent's information were his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case and the reports and records of the Bureau of Narcotics." The facts in the case at bar are similar to those in the case of *Lathem v. U. S.*, 259 F. 2d 393, where the Court said at page 398, "Here, it is clear that Slotnik had personal knowledge, based his charge on knowledge, not belief, and that the complaint is an affirmative statement from an affiant with personal knowledge. Unlike the *Giordenello* case, the Commissioner could determine whether there was probable cause for issuance of the warrant. He did not have to accept a mere conclusion." In my opinion the complaint herein was sufficient and the warrant was properly issued thereon.

However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that DiBella had committed a violation of the Narcotics Act sufficiently reasonable to justify his arrest without a warrant. Section 7607 of Title 26, U. S. Code, states that among others, Agents of the Bureau of Narcotics may "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

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In the recent case of *Draper v. United States*, 358 U. S. 307, an Agent of the Bureau of Narcotics in Denver arrested the defendant without a warrant after having been advised by one Hereford, a "special employee", that the defendant was peddling narcotics, that he had gone to Chicago to purchase heroin, and would return to Denver with it on September 8th or 9th, 1956. Hereford gave the Agent a physical description of the defendant and the clothes he was wearing, informed him that he would carry a tan zipper bag, and that he habitually walked fast. On the morning of September 9th the Agent saw a person answering that description and carrying a tan zipper bag, alight from an incoming Chicago train at the Denver station and walk quickly toward the exit. The Agent, accompanied by a police officer, arrested defendant, searched him and found two envelopes containing heroin clutched in his left hand in his raincoat pocket. The defendant attacked the arrest and subsequent search and seizure as violative of the Fourth Amendment, in that the information given by Hereford to the Agent was hearsay and could not be considered by him in determining whether there was probable cause, and that the Agent's information was insufficient to meet the test of "probable cause" and the requirement that there be reasonable grounds for believing a violation had taken place.

The Supreme Court rejected both arguments. It held, at pages 311 and 312, that *Brinegar v. U. S.*, 338 U. S. 160, had decided that there was "a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunal which determine them, and

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therefore a like difference in the *quanta* and modes of proof required to establish them." 338 U. S. at 172, 173. The Agent, therefore, they hold properly considered Hereford's information, even though it was hearsay, in arriving at "probable cause."

The decision went on to say at page 313 "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar v. United States*, *supra*, at 175. Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States*, 267 U. S. 132, 162." (Emphasis added.)

In the case of *United States v. Walker*, 246 F. 2d 519, Circuit Judge Finnegan reviewed the whole field of the law respecting arrests without a warrant, and stated at page 527, "Reasonable ground then, is the litmus paper for testing validity of arrests without a warrant. Implicit in such test is the exclusion of arbitrary and capricious interference with individual freedom. Dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. Consequently organic law, reflected in the relevant statutes and Rules of Criminal Procedure interpose the judiciary between law enforcement officers and citizens by requiring, as normal procedure, application for warrants and the attendant opportunity for the judicial

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branch to pass on the question of probable cause. This constitutional insulation against infringing basic rights is removed only under classes of exigencies which have been judicially approved on review and now form a discernible pattern of instances, excusing law-enforcement officers for by-passing the requirement of having the judiciary first rule upon the question of probable cause. In those situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard. After all when an arrest without a warrant is classed as valid, it simply means such action is judicially tolerated as being within constitutional bounds of reasonableness as officially or pragmatically defined as case-law. Fresh combinations of facts must necessarily be examined under the terms labelled 'probable cause' and 'reasonable grounds' for neither one is a static concept. But the criteria embedded in each continues to be one that refuses approval for arrests without a warrant where an officer is stimulated by an *inkling only*. *For he must act as a man of reasonable caution. 'Suspicion' is an elusive word with a wide spectrum of intensities and courts must examine the facts underlying it rather than be deflected by the word itself.*" (Emphasis added.)

It is my opinion that the evidence in the possession of Agent Costa was more than sufficient to give him reasonable ground to believe that DiBella had violated the Narcotics Acts on August 26, 1958 and September 10, 1958, on both of which occasions he had *personally* observed him meet

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Panzarella immediately prior to the sales of heroin to Agent Moynihan, about which he was told by the latter, who is clearly a more reliable source of information than were the informers in the *Draper* and *Walker* cases, *supra*. Agent Costa could, therefore, have arrested the defendant DiBella without the warrant on March 9th, 1959.

The arrest having been properly made, I find that the search incident thereto was proper, and that the evidence resulting therefrom was not illegally obtained.

The motion is in all respects denied, without prejudice, however, to a renewal thereof on the trial.

Settle order on notice.

Dated: November 4th, 1959

LEO F. RAYFIEL
United States District Judge

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 349—October Term, 1959.

(Argued June 14, 1960 Decided November 23, 1960.)

Docket No. 26049

MARIO DiBELLA,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

Before:

WATERMAN, MOORE and HAMLIN,*

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Rayfiel, J., denying a motion for the suppression of evidence obtained by means of an allegedly unlawful search and seizure. Affirmed.

JEROME LEWIS, *for appellant.*

CORNELIUS W. WICKERSHAM, JR., United States Attorney, Eastern District of New York (Joseph J. Marcheso, Assistant United States Attorney, of counsel), *for appellee.*

* Of the Ninth Circuit, sitting by designation.

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HAMLIN, Circuit Judge:

Mario DiBella, appellant, appeals from an order of the District Court denying his motion to suppress certain evidentiary items seized in his apartment by agents of the Federal Bureau of Narcotics on March 9, 1959, at the time of his arrest. The motion was made after arrest and arraignment of appellant but before his indictment.

On November 30, 1959, subsequent to his indictment, the motion was denied by the District Court, with leave to renew it at the time of trial. On December 3, 1959, appellant gave notice of appeal to this Court from the order of the District Court. There has as yet been no trial of appellant.

Initially, the United States, appellee, raises the question as to whether such an order is appealable.

Over a period of many years this Court has consistently held that where the application is made prior to indictment, as it was in this case, that a defendant may appeal to this Court from an order denying his motion to suppress. *United States v. Poller*, 43 F. 2d 911 (2 Cir. 1930); *Cheng Wai v. United States*, 125 F. 2d 915 (2 Cir. 1942); cf. *United States v. Klapholz*, 230 F. 2d 494 (2 Cir. 1956); *United States v. Russo*, 241 F. 2d 285 (2 Cir. 1957).

We hold the order made by the District Court in this case to be appealable.

The motion was argued before the District Court by counsel on either side and affidavits and counteraffidavits were presented for his consideration. From the showing there made, the following factual situation appeared. On

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October 15, 1958, one David W. Costa, a special agent of the Federal Bureau of Narcotics, presented to United States Commissioner Epstein in the Eastern District of New York a complaint praying for the arrest of appellant. This complaint stated:

“That upon information and belief, the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York . . . unlawfully sell, dispense and distribute a narcotic drug, to-wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law . . .

“That the source of your deponent’s information and the grounds for his belief are your deponent’s personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics.”

Upon the basis of this complaint Commissioner Epstein issued a warrant of arrest.

On March 9, 1959, the narcotic agents saw appellant sitting in his living room in his apartment. At 8:15 p.m. Agent Costa, with the warrant of arrest in his possession, went with other agents to appellant’s apartment. It was nighttime. The agents rang the bell and the door was opened by appellant’s stepdaughter. The agents identified themselves, showed her their credentials, and walked into the living room, where they identified themselves to appellant, showed him a copy of the arrest warrant, and placed

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him under arrest. A quantity of narcotics was found, which, together with other items, the agents seized.¹

In *Application of Fried*, 68 F. Supp. 961, consideration was given to the sufficiency of a complaint upon which a warrant of arrest was issued. There, the complaint, after alleging that the defendants had in their possession certain goods and chattels knowing the same to have been stolen, contained the following statement:

“The sources of deponent’s information and the grounds of his belief are an investigation conducted by him in the course of his official duties.”

¹ The foregoing facts are undisputed. The only substantial conflict in the affidavits concerns the circumstances of the search. According to the affidavit of the Assistant United States Attorney the agents asked DiBella if he would permit them to make a search of the apartment. Appellant then told one of the agents “I know what you came for. I have all the stuff in a suitcase in the closet. There’s no use tearing the place apart.” Appellant then took the agents to his bedroom where a suitcase was found in the closet, and opened. It contained approximately a pound of heroin, a quantity of cocaine, and certain paraphernalia used to “cut” the narcotics. Appellant then stated that this was all the heroin he had in his possession. Approximately \$8,675 was found in the apartment, and appellant later admitted that this money represented profits which he had made in the sale of narcotics. Appellant also later admitted that he had voluntarily turned over the seized heroin to the agents at the time that they visited his apartment to arrest him.

An affidavit filed by DiBella’s counsel presents a different version of the events following DiBella’s arrest. According to this affidavit “About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents.”

DiBella’s affidavit is not contrary to either of the above affidavits but merely states that the agents, after exhibiting to him the warrant for his arrest, “proceeded to make a general exploratory examination of my apartment. They discovered a quantity of narcotics in my apartment and seized said narcotics and in addition thereto a suitcase, miscellaneous papers, my passport and divers other items.”

Under either version it does not appear that the search of appellant’s apartment was an unreasonable one.

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The Court there held "Such a complaint will not support a warrant of arrest. *U. S. v. McCunn*, D. C. S. D. N. Y., 1930, 40 F. 2d 295; *United States ex rel. King v. Gokey*, D. C. N. D. N. Y., 1929, 32 F. 2d 793; * * * *United States v. Pollock*, D. C. N. J., 1946, 64 F. Supp. 554; *United States v. Rurolde*, D. C. S. D. N. Y., 220 F. 210."

Recently the question of the sufficiency of a complaint to justify a warrant of arrest was considered in *Giordenello v. United States*, 357 U. S. 480.

The complaint in that case read as follows:

"The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas * * *, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; . . .

"And the complainant further states that he believes that are material witnesses in relation to this charge."

In striking down the complaint as insufficient in that case, the Court said:

"The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The Court further said: _____

"Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential

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facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it * * *'. The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ' * * * no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized,' of course applies to arrest as well as search warrants."

We hold that the complaint upon which the warrant of arrest was based was deficient in this case, and would not support the warrant of arrest which was issued under it. It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been committed was grounded on his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics," but what other sources could there possibly be? Such a shotgun, all-encompassing enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless "other witnesses" or the unidentified "reports and records." The complaint is no better than that in *Giordenello v. United States*, and the warrant is invalid for the same reasons.

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Appellee, however, contended in the court below (as it contends here) that regardless of any objection of appellant that the warrant of arrest was improperly issued, that Agent Costa had probable cause to effect a valid arrest of appellant under the authority of 26 U. S. C. §7607, which states that, among others, agents of the Bureau of Narcotics may:

“(2) Make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.”

The District Court, in its opinion agreeing with the position of appellee, stated: “However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that DiBella had committed a violation of the Narcotics Acts sufficiently reasonable to justify his arrest without a warrant.” To properly evaluate this contention, we shall examine some of the further facts that were presented upon the hearing to the District Judge.

It appears that on October 6, 1958, Agent Costa and another agent, one Daniel D. Moynihan, in an endeavor to obtain a search warrant each signed and presented to United States Commissioner Abruzzo an affidavit which set forth the knowledge each agent had from personal observation and from information received, concerning the ac-

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tivities of appellant in connection with possession and sale of narcotics.

These affidavits set forth in detail certain events occurring on August 26, 1958, and on September 10, 1958, from which it could be inferred that there was a sale of narcotics on each of those two occasions by appellant to the narcotics agents through one Panzarella. These affidavits are set out in full in a footnote.²

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[AFFIDAVIT OF DAVID W. COSTA]

EASTERN DISTRICT OF NEW YORK, ss.:

DAVID W. COSTA being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with Daniel D. Moynihan, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale not from the original stamped packages and not pursuant to any written order for in violation of the provisions of the Internal Revenue Tax Laws.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Upon information and belief, Mario DiBella rents apartment #42 at 35-15 80th Street, Jackson Heights, Queens, New York.

At 7:30 A.M. on August 26, 1958, I observed Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, Long Island, New York. DiBella walked to the street and entered his Chrysler automobile New York License No. 6971NE. DiBella drove to 37th Avenue and 79th Street, Jackson Heights, where he met one Sammy Panzarella, who entered the Chrysler automobile driven by DiBella. The two men drove to Roosevelt Avenue and 79th Street where Panzarella left the car. I observed Panzarella walk to 78th Street, where, upon meeting Agent Moynihan, Panzarella handed a small envelope to him. Later tests showed that this envelope contained heroin hydrochloride.

A second purchase of heroin from Panzarella was arranged by Agent Moynihan to be effected September 10, 1958.

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A search warrant was not issued by United States Commissioner Abruzzo, to whom the affidavits were presented, but the affidavits were presented to the District Judge for his consideration on the instant motion to suppress.

In *Draper v. United States*, 358 U. S. 307, at 310, it was held that where a narcotic agent had "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of the Narcotic Control Act to believe that a person had committed or was committing a violation of the narcotics laws, he could make a

At 11:00 P.M. September 10, 1958, I observed Mario DiBella leave Apartment #42 at 35-15 80th Street, Jackson Heights, New York and walk to Roosevelt Avenue and 74th Street where he met Panzarella. DiBella and Panzarella then walked to 76th Street near Roosevelt Avenue, where they parted company. Panzarella then met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he claimed he had obtained from DiBella.

Upon information and belief, Mario DiBella has been a source of supply of heroin hydrochloride to Samuel Panzarella over a period of years; that on each of the two occasions described above, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York and proceeded directly to meet Samuel Panzarella; that Samuel Panzarella then proceeded directly to Agent Moynihan and sold him a quantity of heroin hydrochloride.

That the source of your deponent's information and the grounds for his belief are the investigation and reports of Agents of the Bureau of Narcotics; the statements of Samuel Panzarella and other witnesses and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David W. Costa on October 6, 1958.)

[AFFIDAVIT OF DANIEL D. MOYNIHAN]

EASTERN DISTRICT OF NEW YORK, ss.:

DANIEL D. MOYNIHAN being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together

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lawful arrest. The Court there said, quoting *Brinegar v. United States*, 338 U. S. 160, 172-173:

“ ‘There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them.’ ”

At page 313, the Court said:

“ ‘In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are

with David W. Costa, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely: heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale and that these drugs are not from the original stamped packages and not pursuant to any written order form, in violation of the provisions of the Internal Revenue Tax Laws.

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

Your deponent met one Samuel Panzarella who offered to sell heroin to your deponent. At the time of the meeting, Samuel Panzarella and your deponent agreed to effect the sale of heroin to your deponent, this sale to be made on August 26, 1958 at 8 o'clock in the morning. At six o'clock in the morning on August 26, 1958, your deponent met Samuel Panzarella in Manhattan. Samuel Panzarella stated that he wished to telephone his source of supply of heroin, and he thereupon made a telephone call. After the telephone call was completed, Samuel Panzarella stated to your deponent that delivery of the heroin would be made to your deponent at 8:30 A.M. that morning.

Your deponent then drove with Samuel Panzarella to Jackson Heights, Long Island and parked on 79th Street, north of Roosevelt Avenue. Samuel Panzarella left the vehicle at about 7:30 A.M. that morning and your deponent observed him walk to 79th Street and 37th Avenue and enter a green Chrysler, New York license #6971NE.

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not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. United States*, *supra*, at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States*, 267 U. S. 132, 162."

In the present case, Costa had not only the benefit of his own observations of the contacts and activities of appellant and Panzarella, but he also had the benefit of the information given him by Agent Moynihan as to the sales of heroin by Panzarella to Moynihan.

Your deponent observed Samuel Panzarella leave that Chrysler several minutes later at 79th Street and Roosevelt Avenue. Samuel Panzarella then returned to the vehicle used by your deponent, and at 8:05 A.M. that morning Samuel Panzarella handed your deponent a glassine envelope containing a white powder which subsequent tests proved to be an ounce of heroin hydrochloride.

A similar pattern of events followed on September 10, 1958. At 9:30 in the evening of September 10, 1958, Samuel Panzarella and your deponent met in Manhattan, where Samuel Panzarella offered to sell your deponent another ounce of heroin. Samuel Panzarella stated that it would again be necessary to go to Jackson Heights to meet his "connection," and that he would telephone his "connection." Panzarella then made a telephone call at 9:40 P.M. on September 10, 1958. Your deponent and Samuel Panzarella went to 74th Street and Roosevelt Avenue, Jackson Heights, Long Island, New York. At 11:05 P.M. Samuel Panzarella left your deponent. Your deponent observed him meet Mario DiBella a few minutes later, and saw Mario DiBella walk with Samuel Panzarella from 74th Street to 37th Road. Samuel Panzarella returned to your deponent at 11:20 P.M. and your deponent and Samuel Panzarella then drove to New York City. Enroute, Samuel Panzarella handed a glassine envelope containing a white powder to

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An examination of the affidavits of Agents Moynihan and Costa shows that both on August 26, 1958, and on September 10, 1958, appellant and Panzarella were under the surveillance of each agent. On August 26, for instance, Panzarella agreed to sell Moynihan heroin, and stated that he had to contact his connection. He made a telephone call and then went with Agent Moynihan to 79th Street near Roosevelt Avenue in Jackson Heights. Moynihan saw Panzarella leave his vehicle, walk to 79th Street and 37th Avenue, and enter a green Chrysler automobile with New York license No. 6971NE. Moynihan saw Panzarella leave the Chrysler a few minutes later at 79th Street and Roosevelt Avenue, and saw Panzarella return to his vehicle, upon which Panzarella handed to Moynihan the envelope

your deponent, which powder was tested and found to be heroin hydrochloride.

Samuel Panzarella stated that DiBella was his source of supply of heroin and that DiBella had supplied the heroin sold to your deponent on September 10, 1958 and August 26, 1958.

No tax stamps were seen by your deponent on either of the glassine envelopes received from Samuel Panzarella on September 10, or August 26, 1958, nor was the sale of these two packages pursuant to a written order form.

Upon information and belief, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York on each of the two occasions described above and met Samuel Panzarella directly thereafter; that Samuel Panzarella then directly proceeded to meet your deponent and the sale of heroin was effected; that Mario DiBella has been a source of supply of illegal heroin hydrochloride for an extended period.

That the source of your deponent's information and the grounds for his belief are the statements made by Samuel Panzarella, the observations and investigation of other narcotic agents and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by Daniel D. Moynihan on October 6, 1958.)

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which proved to contain heroin. At the same time, Costa saw appellant enter the same Chrysler automobile and saw him drive to 37th Avenue and 79th Street, saw him meet Panzarella who then entered the Chrysler automobile. He saw the two men drive to 79th Street and Roosevelt Avenue and saw Panzarella leave the automobile. Costa then saw Panzarella walk to 78th Street and meet Agent Moynihan and hand a small envelope to him. The later tests showed that this envelope contained heroin.

Likewise, on September 10, 1958, each agent saw approximately the same procedure followed between Panzarella and appellant. On the latter occasion, Panzarella, after being in contact with appellant, came back to Moynihan and sold him an ounce of heroin which he told Moynihan he obtained from DiBella. Appellant was seen meeting Panzarella, be with him briefly, and Panzarella was seen to immediately return to Moynihan with the heroin.

Taking all of the circumstances together, we believe that there was ample evidence to hold that Costa had "reasonable grounds to believe" that appellant had committed a violation of the narcotics laws. With all the information Costa had, both from his own observation and from information received from Moynihan, Costa would have indeed been naive if he did not believe that appellant had just provided the narcotics which Panzarella delivered to Moynihan. Although Costa's affidavit was based in part on hearsay, there was "a substantial basis for crediting" the information given him by a fellow-agent, information which was wholly consistent with what Costa himself had observed. *Jones v. United States*, 362 U. S. 257, 269. We

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hold that at any time after September 10, 1958, Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics laws.

Appellant contends, however, that the delay from September, 1958, until March, 1959, when the arrest was made, was sufficient to say that in March, 1959, Costa did not have reasonable grounds to believe that DiBella had committed a narcotics violation. We cannot so hold.

An explanation was given by appellee that the delay was occasioned by a desire on the part of the agents to uncover further violations. Be that as it may, we do not believe that the delay eradicated from Costa's mind the knowledge that he had received by September, 1958, of appellant's apparent violations of the narcotics laws.

When appellant was arrested on March 9, 1959, Costa had in his possession the warrant of arrest which had been issued October 15, 1958, and after arresting appellant under color of this warrant, which we have held to have been invalidly issued, made a return on it showing that he had executed the warrant by arresting DiBella on the 9th day of March, 1959.

We do not believe that this helps appellant. Although Costa apparently believed that this warrant was a valid one, yet, even though it was not, the arrest may be justified on the ground that Costa had reasonable grounds to believe that DiBella had committed a narcotics violation.

In *Williams v. United States*, 273 F. 2d 781, the arrest was made upon a warrant of arrest which the Court held

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to be invalid. However, the arrest was justified on the basis of the arresting officer having reasonable grounds to believe a violation had been committed.

In *Giordenello v. United States*, *supra*, the Supreme Court held that the warrant of arrest was invalid. The case points out, however, that in the Supreme Court, for the first time, the Government contended that the arrest could be justified without a warrant on the basis that there was probable cause to believe that the person arrested had committed a felony. The Supreme Court held that these contentions by the Government, having been made for the first time before that Court, were belated, and refused to consider them. The case was reversed, but the Supreme Court stated:

“This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner’s arrest without relying upon the warrant.”

The arrest of DiBella by Costa, who, on March 9, 1959, had reasonable grounds to believe DiBella had committed a violation of the narcotics law, was a lawful arrest. The arrest being lawful, a reasonable search of appellant’s premises, such as shown in this case, was proper. *United States v. Rabinowitz*, 339 U. S. 56.

Judgment affirmed.

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WATERMAN, *Circuit Judge* (dissenting):

I concur in the holding that, inasmuch as the motion was made prior to indictment, the denial of the motion to suppress is an appealable order. I also agree with my colleagues that the warrant of arrest is invalid under *Giordenello v. United States*, 357 U. S. 480 (1958) and earlier cases. However, I am unconvinced that Agent Costa had "reasonable grounds" for arresting DiBella without possessing a valid warrant for his arrest. Therefore, I would hold that the subsequent search of the DiBella home cannot be justified as incidental to DiBella's lawful arrest. Moreover, even assuming *arguendo* that the arrest was a lawful one, I disagree with the conclusion the majority reach that the subsequent search is justifiable as incidental to the arrest.

As the majority opinion sets forth, the "reasonable grounds" contemplated by the Narcotics Control Act, 26 U. S. C. §7607, are equivalent to the "probable cause" required under the Fourth Amendment, *Draper v. United States*, 358 U. S. 307 (1959), and the quantity and quality of the evidence to substantiate "probable cause" need not be as great as that required for a determination of guilt. *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725 (1960); *Henry v. United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Draper v. United States*, *supra*, *Brinegar v. United States*, 358 U. S. 160 (1949); *Carroll v. United States*, 267 U. S. 132 (1925).

In determining whether a law enforcement officer had "reasonable grounds" (i.e. "probable cause") to act as he

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did, we should approach a resolution of the issues in the light of the historical interpretation this language of the Fourth Amendment has been accorded in the past. And, of course, we should look at the occurrence we are examining with the greater particularity when, as here, the officer, unprotected by a prior valid judicial act, invades a family's permanent domicile in the night-time.

The latest of the several Supreme Court summaries setting forth the philosophy underlying the meaning of "upon probable cause" and an historical exemplification of that philosophy appears in *Henry v. U. S.*, *supra*. There Justice Douglas states, 361 U. S. 98, 101, 80 S. Ct. 168, 170:

And as the early American decisions both before and immediately after its [the Fourth Amendment] adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day * * * [citing cases]. Its highwater was *Johnson v. United States*, *supra* [333 U. S. 10 (1948)], where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.

There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without an arrest warrant, or approved a search without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the instant case.

The *Carroll* and *Brinegar* cases, *supra*, dealt with violations of the federal liquor laws. Defendants in each case

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were arrested on the open road while transporting liquor. In each case the arresting officer had observed the defendant at some length and could attest personally to the defendant's having handled liquor. Defendants in *Carroll* had offered the officer alcohol on a previous occasion. Brinegar previously had been arrested by the same officer for illegally transporting liquor, and in the six months preceding the arrest at issue that officer had twice seen the defendant loading liquor into a car or truck.

Draper v. United States, supra, dealt with the specific section of the Narcotics Control Act here involved. There the arresting officer had information from a paid "special employee" of the Bureau of Narcotics that Draper was peddling narcotics and would arrive in Denver by train carrying a shipment of narcotics. Draper was arrested as he alighted from the train.

In *Jones v. United States, supra*, the question of whether the magistrate who issued a warrant had sufficient competent evidence before him in the officer's affidavit to justify issuance was decided favorably to the Government. Probable cause was there found because the officer's affidavit not only set forth information given by an unnamed informer but also stated that the officer personally knew the persons informed upon, and knew they were narcotics users. Furthermore, the informer had given reliable information in the past and the information given this time was corroborated by other informants. See 362 U. S. 267, fn. 2, 80 S. Ct. 734, fn. 2.

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What evidence is offered in this case to justify a judicial finding that Agent Costa had "reasonable grounds" (i.e., "probable cause") to arrest DiBella without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958 a defective arrest warrant was issued. On March 9, 1959 DiBella was arrested by three agents in the evening as he was sitting in his living room. It is claimed that during this five months' period the agents were awaiting expected additional violations, but Agent Costa could not point to a single incident in that five months' period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant.

Draper, Brinegar and Carroll were arrested when there was a real need for rapid action but even in those cases more evidence justifying arrest was introduced than here. In *Brinegar* and *Carroll* additional evidence was compiled during the period of surveillance. Here no such evidence was accumulated, and the informer Panzarella was something less than the trustworthy "special employee" in

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Draper. This case is perhaps closest to *Jones*, but even there more corroborating evidence was introduced, and the initial invasion of the privacy of the apartment where Jones was discovered was pursuant to a valid search warrant issued by "an independent judicial officer."

It is interesting to compare the facts in the instant case with those in *Henry v. United States*, *supra*, in which the Supreme Court refused to find probable cause. In *Henry* the arrest followed surveillance by two FBI officers. Henry and a confederate had been seen making two trips transporting cartons in an automobile from a residential section of the city to a tavern. The FBI had developed an interest in Henry because the confederate had been "implicated in interstate shipments" and in that area there had been some whiskey stolen from an interstate shipment. Henry and his confederate were stopped during the second trip and were found to be carrying stolen radios in their car. The Supreme Court reasoned that using an auto to transport small cartons was an outwardly innocent activity, and the FBI agents could not rely in justification for their acts upon an informer's story to them that Henry's confederate was implicated in a former theft of an interstate shipment. DiBella's two meetings with Panzarella were to all outward appearances a more innocent association than the two trips Henry and his confederate were making. No invasion of one's domicile was involved in *Henry*, and the Court recognized that "*Carroll v. United States*, *supra*, liberalized the rule governing searches when a moving vehicle is involved." But even under these circumstances the Court went on to say, "But that decision [*Carroll*]

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merely relaxed the requirements for a warrant on grounds of *practicality*. It did not dispense with the need for probable cause." (Emphasis supplied.) 361 U. S. 98, 104, 80 S. Ct. 168, 172. Accord, *Rios v. United States*, 364 U. S. 253, 80 S. Ct. 143 (1960). See *Eng Fung Jem v. United States*, 281 F. 2d 803 (9 Cir. 1960). Moreover, in cases where arrests without warrant have been sought to be justified as having been made upon probable cause the courts of appeal have felt constrained to discover special circumstances to justify the arrests. See *United States v. Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States v. Volkell*, 251 F. 2d 333, 336 (2 Cir.), *cert. denied*, 356 U. S. 962 (1958); *United States v. Walker*, 246 F. 2d 519, 527 (7 Cir. 1957). See also *Williams v. United States*, 273 F. 2d 781, 791 (9 Cir.), *cert. denied*, 362 U. S. 951 (1960) (informer was paid employee), relied on by the majority here.

The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority holding here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed. *United States v. Joines*, 258

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F. 2d 471 (3 Cir.), *cert. denied*, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest. See *United States v. Joines*, *supra* (21 days); *Seymour v. United States*, 177 F. 2d 732 (D. C. Cir. 1949), (6 days); *State v. Kopelow*, 126 Me. 384, 138 Atl. 625 (1927) (7 days); *State v. Nadeau*, 97 Me. 275, 54 Atl. 725 (1903) (23 days); *Kent v. Miles*, 69 Vt. 379, 37 Atl. 1115 (1897) (17 days). The permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey v. United States*, 261 F. 2d 870, 872 (5 Cir. 1958), *cert. denied*, 359 U. S. 969 (1959), the court stating that the arresting officer "may defer the arrest for a day, a week, two weeks, or perhaps longer." Surely in the present case where no new evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale "probable cause." I would hold that the arrest of a person who has been under surveillance for seven months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on

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October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale.

However, assuming that the officers had probable cause to arrest DiBella the search of his home cannot even then be justified. The mere fact that a search immediately follows a valid arrest does not conclusively establish the reasonableness of that search. *Abel v. United States*, 362 U. S. 217, 235, 80 S. Ct. 683, 695 (1960); *United States v. Rabinowitz*, 339 U. S. 56, 65-66 (1950). See *Rios v. United States*, *supra*, at 261, 80 S. Ct. at 1436. A long and inconsistent series of cases has attempted to define the permissive area of a valid search incidental to an arrest. But as Justice Frankfurter pointed out this year in *Abel*:

The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare *Marron v. United States*, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, with *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374, and *United States v. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, compare *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris v. United States*, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399, and *United States v. Rabinowitz*, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; compare also *Harris*, *supra*, with *Trupiano v. United States*, 334

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U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests. 362 U. S. at 235, 80 S. Ct. at 695.

Although Justice Frankfurter, in *Abel*, was unwilling to attempt a reconciliation of the cases, he had on two prior occasions analyzed in detail the decisions involving searches and seizures incidental to arrests. *Harris v. United States*, 331 U. S. 145, 155-183 (1947) (dissent); *United States v. Rabinowitz*, *supra*, at 68-86 (dissent). From his analysis we can discern a pattern that has eroded the homeowner's right to personal privacy in his dwelling to the point where it would seem that the entire home is subject to search by the police if armed with a valid warrant for the homeowner's arrest. *Harris v. United States*, *supra*. *Trupiano v. United States*, *supra*, restricted *Harris* by pointing out that such a broad search without a search warrant could only be condoned as incidental to a lawful arrest where there was a practical necessity for speed. The need for this showing was later rejected in *United States v. Rabinowitz*, *supra*. Therefore, now, as a result of this steady erosion, on the authority of *Harris*, as resurrected by *Rabinowitz*, a prisoner's apartment may be lawfully searched without a search warrant as incidental to his lawful arrest, unless the prisoner's situation is meaningfully distinguishable from that present in those cases.

Two factors distinguish the instant case. First, in *Harris* and *Rabinowitz* a valid warrant of arrest had been issued. Thus there had been a proper decision by a dis-

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interested magistrate that probable cause of guilt existed. No valid warrant issued here. There is no Supreme Court case upholding the officers' acts where a home was searched by officers armed with neither an arrest warrant nor a search warrant. *Draper v. United States, supra*, involved the search of a prisoner's person; *Brinegar and Carroll* the search of the prisoners' automobiles. It is certainly clear that "There is a vast difference between entering and searching homes or even hotel rooms which are fixed and more or less permanent locations and stopping a person or car on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear." *United States v. Mancso*, 252 F. 2d 220, 223 (2 Cir. 1958).

As Justice Douglas speaking for the Court has said:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search war-

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rant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *McDonald v. United States*, 335 U. S. 451, 455-56 (1958).

Second, in further contrast to *Harris* and *Rabinowitz*, DiBella's arrest and the subsequent search of his residence occurred in the night-time. Rule 41(c) of the Federal Rules of Criminal Procedure provides that a search warrant shall be restricted to daytime execution unless the affidavit indicates positively that the objects to be seized are upon the premises. See also *Distefano v. United States*, 58 F. 2d 963 (5 Cir. 1932). In *Jones v. United States*, 357 U. S. 493, 498-499 (1958), the Supreme Court stated, by Justice Harlan, that the provisions relative to night-time search in Rule 41(c) are "hardly compatible with a principle that a search without a warrant can be based merely upon probable cause." To be sure, the probable cause the Court was there discussing was probable cause for the existence of objects of seizure rather than probable cause to justify an arrest. But I see no difference in principle between the two situations.

Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*, but is amplifying and extending the doctrine of those cases. Furthermore, the fact that the search uncovered narcotics cannot change the result, for "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U. S. 581, 595 (1948). Nor do I find persuasive the argument that such searches are necessary for the ef-

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fective control of narcotics traffic. Justice Jackson, speaking for the Court, disposed of this argument in *United States v. Di Re, supra*, at 595:

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

And as Justice Douglas said in his dissent in *Draper v. United States, supra*, at 314-15:

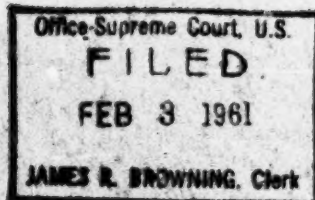
Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

Appendix B—Opinion of United States Court of Appeals

Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis of an exhaustive search of appellant's home.¹ To condone such activity "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest." *United States v. Rabinowitz, supra*, at 80 (Frankfurter, J., dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents.

¹ There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant.

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No. ~~574~~ 21

In the Supreme Court of the United States

OCTOBER TERM, 1960

MARIO DiBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31-58) is not yet reported. The opinion of the district court (Pet. 21-30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1960. (The petition for a writ of certiorari was filed on December 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).)

QUESTION PRESENTED

Whether the district court properly denied a motion to suppress evidence obtained during the course of a valid arrest.

STATUTE INVOLVED

26 U.S.C. 7607:

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(I) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(I)), may—

.

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

STATEMENT

Petitioner moved in the District Court of the Eastern District of New York to suppress evidence seized at the time of his arrest. The motion was made before, but was acted upon by the district court after, an indictment had been returned. The motion to suppress was denied by the district court without prejudice to renewal at the trial (R. 81a-90a). The court of appeals, after holding the order appealable, affirmed the order of district court (Pet. 31-58). The facts concerning the motion to suppress are as follows:¹

¹ At the hearing on the motion, the district court listened to oral arguments of counsel and accepted opposing and supporting affidavits.

1. Prior to August 26, 1958, David W. Costa and Daniel W. Moynihan, agents of the Bureau of Narcotics, were conducting an investigation into the suspected illicit narcotic activities of Samuel Panzarella and the petitioner, DiBella. Moynihan, posing as a narcotics buyer, gained Panzarella's confidence and Panzarella agreed to sell heroin to him (R. 29a). Moynihan met Panzarella at 6:00 a.m. on August 26, 1958, in Manhattan. Panzarella stated that he wanted to telephone his source of supply. Following the call, Moynihan was told by him that the delivery would be effectuated at 8:30 a.m. (*ibid.*). Panzarella and Moynihan then drove to Jackson Heights, Long Island. The car was parked on 79th Street, north of Roosevelt Avenue (*ibid.*).

Agent Costa, suspecting that petitioner was Panzarella's source of supply, kept petitioner's home in Jackson Heights under surveillance on the morning of August 26 (R. 26a). Costa observed petitioner leave his home at 7:30 a.m., enter a Chrysler automobile, New York license number 6971NE, and drive to 37th Avenue and 79th Street in Jackson Heights (*ibid.*).

After Panzarella left his car, agent Moynihan observed him walking to 79th Street and 37th Avenue where he entered a Chrysler bearing New York license number 6971NE (R. 26a, 29a). Panzarella and petitioner drove to 79th Street and Roosevelt Avenue followed by Costa. Both agents Moynihan and Costa saw Panzarella leave petitioner's automobile and walk directly to 78th Street. Moynihan met Panzarella there, under Costa's observation, and was handed a

small glassine envelope. The envelope had no tax stamps attached thereto (R. 28a-30a). Subsequent tests showed the contents of the envelope to be heroin hydrochloride (R. 26a, 29a).

2. A second purchase of heroin from Panzarella was arranged by agent Moynihan to take place on September 10, 1958. Moynihan and Panzarella met in Manhattan at 9:30 that evening and Panzarella stated that once again it would be necessary to drive to Jackson Heights to meet his "connection" (R. 29a-30a). At 9:40 p.m. Panzarella placed a telephone call to his "connection" (R. 30a). Moynihan and Panzarella drove to 74th Street and Roosevelt Avenue in Jackson Heights. Agent Costa, watching petitioner's home, saw him leave at 11:00 p.m. and walk to 74th Street and Roosevelt Avenue (R. 26a). At 11:05 p.m. Panzarella left Moynihan in the parked automobile (R. 30a). Both agents observed Panzarella and petitioner meet and walk together from 74th Street to 37th Road (R. 26a; 30a). Panzarella returned to the automobile and enroute to New York City handed agent Moynihan a glassine envelope containing a white powder later found to be heroin hydrochloride. No tax stamps were on the envelope (R. 30a). Panzarella told Moynihan that petitioner was his source of supply (*ibid.*).

3. On October 6, 1958, agents Costa and Moynihan applied for a nighttime search warrant for petitioner's premises, on the basis of affidavits setting forth generally the above facts (R. 25a-31a). The United States Commissioner denied the request (R. 51a-52a).

On October 15, 1958, the Commissioner issued a warrant of arrest, based upon the complaint of agent Costa charging petitioner with the sale of September 10, 1958. The affidavit stated that the sources of the agent's information and belief were "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics" (R. 7a, 21a-22a).¹

On March 9, 1959, at approximately 8:15 p.m., agent Costa and two other federal narcotics agents, armed with the arrest warrant issued by the United States Commissioner, went to petitioner's apartment in order to arrest him (R. 8a). Petitioner was observed sitting in his living room. The agents rang the bell of the apartment and the door was opened by a stepdaughter of petitioner. Showing her their credentials, the agents identified themselves and were ushered in (R. 9a). The agents then identified themselves to petitioner and showed him a copy of the warrant for his arrest (R. 9a-10a). Two more federal agents came into the apartment and one of these, agent Coyne, was told by petitioner (R. 10a):

I know what you came for, I have all the stuff in a suitcase in the closet. There's no use in tearing the place apart.

Petitioner led the agents to a closet in his bedroom. Agent Costa removed a brown suitcase from the floor of the closet and opened it. The suitcase contained approximately a pound of heroin, a quantity of cocaine

¹ The warrant was erroneously dated October 6, 1958 (see Pet. App. 22).

and certain paraphernalia used to "cut" narcotics (R. 10a). Agent O'Connor found \$6,000 in a shoebox hidden in a closet in petitioner's bedroom. Petitioner later admitted that this money represented profits earned in the sale of narcotics (*ibid.*). He also admitted having bought and sold heroin over a period of years.*

ARGUMENT

1. There is no occasion for this Court to review the validity of the search and seizure at this stage of the proceeding. Indeed, despite the ruling of the court of appeals, we do not believe that the order was an appealable one. The appealability of such orders is determined by ascertaining whether the orders "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders * * *." *Carroll v. United States*, 354 U.S. 394, 403. Here the motion to suppress had no purpose other than in connection with a criminal prosecution. Petitioner moved to suppress the material seized—i.e., "that the Government be estopped from using such items in any criminal proceeding * * *" (R. 6a). Even though the motion was made before indictment, it was not denied until after indictment, and the denial was specifically declared to be without prejudice to a

*The foregoing facts concerning the actual search of petitioner's apartment are taken from the affidavit of the Assistant United States Attorney. An affidavit filed by petitioner's counsel presents another version of the search (R. 34a):

"About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agent."

renewal of the motion at the trial. Under these circumstances, the order of the district court was so directly related to the criminal case as to be a part of it. See *Zacarias v. United States*, 261 F. 2d 416 (C.A. 5), certiorari denied, 359 U.S. 935; *Saba v. United States*, 282 F. 2d 255 (C.A. 5), pending on petition for a writ of certiorari, No. 643, this Term.* See also the Government's Memorandum in *Saba v. United States*, *supra*.

2. In any event, the denial of the motion to suppress was correct because the search was incident to a lawful arrest. The court of appeals properly held that, although the warrant of arrest was invalid because the supporting affidavit did not specify the grounds of the agents' belief except in general terms, the agents had probable cause to arrest without a warrant; therefore, the search and seizure were incident to a valid arrest.

In order for an arrest to be valid without a warrant, there must exist "probable cause" within the meaning of the Fourth Amendment, or, as phrased in the Narcotic Control Act (26 U.S.C. 7607(2)), "reasonable grounds" to believe that petitioner had committed or was committing a violation of the narcotics laws.* This Court recently defined the standard of probable

* While the decision below is in conflict with *Zacarias* and *Saba*, this conflict cannot justify a grant of the writ of certiorari in the instant case. Petitioner, not the Government, was the beneficiary of the holding that the order was appealable. Petitioner's only quarrel with the court below concerns the merits.

* These terms "are substantial equivalents of the same meaning." *Draper v. United States*, 358 U.S. 307, 310 at note 3.

cause as follows (*Draper v. United States*, 358 U.S. 307, 313):

"In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, [338 U.S. 160,] 175. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162.

As both the district court (Pet. 26, 29-30) and the court of appeals (Pet. 37-44) held after a thorough review of the record in the instant case, agent Costa, the arresting officer, had more than enough facts within his knowledge to constitute "probable cause." Costa personally observed the transactions with which petitioner was charged. In addition, he was cognizant of the observations of agent Moynihan in relation to these transactions (R. 26a-27a; 28a-30a), and of statements made to Moynihan by Panzarella, petitioner's partner, that petitioner was his source of illegal narcotics (R. 30a). The mere lapse of time between the acts constituting probable cause and petitioner's arrest (approximately six months)* did not eradicate from Costa's mind the transactions

* The transactions took place on August 26, 1958, and September 10, 1958. Petitioner's arrest was made on March 9, 1959.

which he personally observed or was told of, and which formed the basis for petitioner's arrest. Under the statute, as at common law, the agents had authority to arrest without a warrant, on probable cause to believe that an offense had been committed, even though there was time to get a warrant. *Dailey v. United States*, 261 F. 2d 870 (C.A. 5), certiorari denied, 359 U.S. 969; see *United States v. Rabinowitz*, 339 U.S. 56, 64-66.

Petitioner claims (Pet. 12) that, since the narcotics agents purported to arrest petitioner under an invalid warrant, the Government cannot justify the arrest on the ground that they could properly have made the arrest without a warrant. But this Court has indicated that, even when law enforcement officers have made an arrest pursuant to a warrant which was later found insufficient to authorize it, nevertheless the arrest is valid as long as the officers in fact had probable cause. *Stallings v. Splain*, 253 U.S. 339, 342; *United States v. Rabinowitz*, *supra*, 339 U.S. at 60.

Petitioner also contends (Pet. 13) that probable cause is not sufficient to support a search at nighttime (approximately 8:15 p.m.) based on an arrest without a warrant. But this Court has never indicated that the validity of an arrest at nighttime depends on any greater showing than the probable cause necessary for arrest at any other time. And this Court has never differentiated between different kinds of valid arrests in determining the validity of a subsequent search. On the contrary, the Court has ruled that a search of the immediate premises depends entirely on the validity of the arrest. *E.g.*, *Abel v. United States*, 362 U.S.

217; *United States v. Rabinowitz, supra*, 339 U.S. at 60. While petitioner (Pet. 13) relies on *Jones v. United States*, 357 U.S. 493, 498-499, that case held only that, under Rule 41 of the Federal Rules of Criminal Procedure, a search without a warrant, *not incident to a valid arrest*, must be based on more than probable cause.'

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,

BRUNO COLAPIETRO,

Attorneys.

FEBRUARY 1961.

* Petitioner also contends (Pet. 19-20) that his arrest "was but a pretext to search his apartment." Although petitioner has the burden of proving such bad faith (cf. *Abel v. United States, supra*, 362 U.S. at 225-230), he offers no evidence on this point except the speculation of the dissenting judge below that more agents were present at the time of petitioner's arrest than were necessary merely for that purpose (Pet. App. 58, note 1). And petitioner's contention, which is a question of fact, was rejected by the district court (Pet. 22, 30).

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MARIO DiBELLA,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (R. 81a) is reported in 178 F. Supp. 5. The majority and dissenting opinions in the Court of Appeals (R. 93, 106) are reported in 284 F. 2d 897.

Jurisdiction

The judgment of the Court of Appeals was entered November 23, 1960 (R. 115). The order allowing certiorari is dated February 20, 1961 (R. 116). The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

Questions Presented

In October 1958 Federal Narcotic Agents applied to a United States Commissioner for a search warrant to search petitioner's home, alleging offenses in August and September 1958. The search warrant was refused. A few days later another United States Commissioner issued an arrest warrant. Some five months later, although no new facts unfavorable to the petitioner had appeared, the Agents invaded petitioner's permanent family dwelling in the nighttime, ostensibly to execute the five-months old arrest warrant. Under color of that warrant, the Agents arrested petitioner and then searched the apartment, finding narcotics. The District Court denied petitioner's motion to suppress the seized evidence and the court below affirmed. However, the court below ruled that the arrest warrant was invalid, nevertheless sustaining the search as incident to a lawful arrest which the Agents could have made under the Narcotic Control Act of 1956 (26 U.S.C. §7607) on the basis of the "personal knowledge" shown in the old abortive search-warrant affidavits. The questions presented are:—

1. Irrespective of the existence of "reasonable grounds" for a warrantless arrest under the Narcotics Control Act, was the search nevertheless unreasonable under the Fourth Amendment in the "total atmosphere" of this case, particularly in light of the fact that the search was a nighttime one of a private dwelling without a search warrant and under color of an invalid arrest warrant, and particularly also in view of strong circumstances pointing to the bad faith of the Narcotic Agents in that they were desirous of making a general exploratory search on the pretext of a

stale arrest and to by-pass advance judicial scrutiny of any proposed search?

2. Whether reasonable grounds existed in this case for a warrantless arrest under the Narcotic Control Act.

3. Whether a narcotics agent may enter a suspect's dwelling in the nighttime without a search warrant or a valid warrant of arrest and search the premises.

4. Whether a nighttime entry into a dwelling to arrest a person upon probable cause that he had committed a felony under circumstances where a valid warrant could have been sought is consistent with the Fourth Amendment.

5. Whether the narcotics agent who made this arrest under color of an invalid warrant can subsequently justify the arrest by afterthought recourse to the Narcotics Control Act; and whether the search incident to such afterthought-based arrest was valid.

6. In light of the rule that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant, and in light of the restrictions of the Fourth Amendment in their entirety may a narcotics agent enter a suspect's home in the nighttime ostensibly to make an arrest under color of an invalid arrest warrant or on an afterthought claim of probable cause to believe that a crime has been committed and then as an incident thereto make a search of the dwelling, no special circumstances being shown either for the warrantless arrest or the warrantless search?

7. Whether under the Narcotics Control Act the agents in this case could constitutionally enter petitioner's home in the nighttime and make an arrest and a search as an incident thereto in the absence of special circumstances.

8. Whether an application for a search warrant has been denied by a United States Commissioner and an invalid warrant of arrest executed, is not a search as an incident thereto in violation of the Fourth Amendment?

9. Whether reasonable grounds exist for a nighttime arrest of a suspect in his dwelling when said arrest is made six to seven months after the alleged commission of the crimes of which the agents had sworn some five months before the arrest that they had contemporaneous knowledge.

10. Whether reasonable grounds for a nighttime arrest under the Narcotics Control Act can be predicated upon a hearsay statement made by a narcotics agent to the arresting narcotic agent, the hearsay deriving ultimately from statements by a narcotic dealer not shown to be a reliable informant.

11. Does not a completely judicially untrammelled action of arrest and search on the part of a narcotics agent under the Narcotics Control Act violate the Fourth Amendment?

12. In the absence of proof that the petitioner might flee before a warrant could be obtained, were not his arrest and the subsequent search of his apartment in violation of the Fourth Amendment?

13. Whether the petitioner's arrest was made as a pretext to search his apartment for evidence of contraband.

14. Does the mere fact that an immediate search follows the arrest establish the reasonableness of the search?

15. Does the issue of appealability of the order denying the motion to suppress still have vitality in view of this Court's granting of certiorari without making reference to that issue? If so, was the order appealable to the court below?

Constitutional Provision and Statute Involved

The case involves the Fourth Amendment of the United States Constitution, reading as follows:

ARTICLE IV

The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The statute involved is the Act of July 18, 1956, Chapter 629, Title I, §104(a), 70 Stat. 570 (28 U.S.C. §7607), reading in pertinent part:

“§7607. Additional authority for bureau of narcotics and bureau of customs

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1)), may—

.

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Other statutes, which are not directly involved in the case but which have a bearing on the issues of law presented, are cited, discussed or quoted at appropriate places, *infra*.

Statement

This is a search-and-seizure case. The judgment of the court below (R. 115) affirmed an order of the District Court (R. 90a) which denied petitioner's motion (R. 3a) to suppress certain evidentiary items seized in his permanent family dwelling by federal Narcotic Agents in an intensive nighttime search without any warrant for arrest or search. The motion to suppress was made after arrest and arraignment of petitioner but before his indictment (R. 1a, R. 3a, R. 22a-24a, R. 94) and was denied after his indictment

(R. 90a, R. 94); petitioner has not yet been placed on trial under the indictment.¹

The record before this Court concerning the factual circumstances of the search and seizure consists exclusively of the record of the proceedings in the District Court on the motion to suppress. The motion was argued in that court by counsel for both sides (R. 53a-80a) on the basis of affidavits and counter affidavits (R. 5a-52a). From the showing thus made the following factual situation appeared:

On October 6, 1958, federal Narcotics Agents David W. Costa and David D. Moynihan presented to United States Commissioner Abruzzo in the Eastern District of New York (R. 9a) their respective affidavits to obtain a nighttime search warrant to search the petitioner's dwelling, a five-room apartment in Queens, New York, alleging Narcotic violations by petitioner on August 26 and September 10, 1958 (R. 25a-31a). Commissioner Abruzzo denied the application for a search warrant (R. 51a-52a).²

¹ The appealability of the District Court's order in the Court of Appeals was challenged by the Government in the latter court (where the order was held appealable, R. 94) and in this Court in the proceedings for the granting of certiorari (Govt's. Br. in Opp., pp. 6-7). Since this Court has granted our petition for a writ of certiorari despite the Government's objection as to appealability, we omit discussion of that subject from this opening brief, reserving the appealability issue for treatment in a reply brief in the event that the Government renews its objections.

² The aforementioned Costa and Moynihan affidavits had no further operative effect in the happenings of this case until the Government produced the affidavits in the proceedings on the motion to suppress, for the purpose of showing that some five months after the affidavits were executed the contents thereof, *without more*, afforded to the Agents probable cause to arrest the petitioner without a warrant and justified a nighttime search of his dwelling as an incident to such arrest (R. 11a, R. 71a-73a, R. 74a-75a). Further details concerning these abortive "search-warrant" affidavits of Costa and Moynihan are recited at appropriate places below.

Nine days later (October 15, 1958) Agent Costa presented to another United States Commissioner in the same Judicial District (Commissioner Epstein) a complaint for a warrant to arrest the petitioner (R. 7a). This complaint stated (R. 7a):

"That upon information and belief, the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law. (T. 26 U.S.C. Par. 4704(a); T. 18 U.S.C. Par. 2).

That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statement of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

Upon the basis of this complaint, Commissioner Epstein issued a warrant of arrest (October 15, 1958) (R. 21a-22a).³

As more fully recited *infra*, this warrant was held invalid by both the majority and dissenting Judges in the court below (R. 97, R. 105).

After the issuance of the invalid arrest warrant of October 15, 1958, some five months elapsed, during which, so far as appears in this Record, the Government developed no further unfavorable information about the petitioner;

³ The actual date of the warrant was October 15, 1958, the date of October 6 on the face thereof being a clerical error (R. 82a).

indeed, there is no affidavit or other proof for the Government in the Record from any person shedding any light on what the Government did or found out about the petitioner during those five months, except for a conclusory averment by Assistant United States Attorney Stewart in his affidavit in the proceedings on the motion to suppress (R. 8a), an affidavit made "upon information and belief" (R. 8a), that "the lapse in time was due to the fact that this investigation was continuing, as other persons were involved" (R. 17a); to similar effect see Mr. Stewart's oral argument before the District Court on the motion to suppress, where he added also that the alleged *interim* investigation during the five-months period mentioned "not proving successful they went ahead and arrested him in the apartment using the old warrant⁴ that they had outstanding for his arrest" (R. 75a-76a).

The ultimate carrying-out of the arrest of the petitioner on this stale and invalid warrant of October 15, 1958, occurred on March 9, 1959.

Certain factual features of that arrest, and of the accompanying search, are undisputed:

On March 9, 1959, the Narcotic Agents, from an observation post in a neighboring building (R. 76a), saw petitioner sitting in the living room of his apartment. At 8:15 p.m. Agent Costa, with the warrant of arrest in his possession, went with other Agents to appellant's apartment. It was nighttime. The Agents rang the bell and the door was opened by appellant's stepdaughter. The Agents identified themselves, showed her their credentials, and walked into

⁴ *I.e.*, the invalid arrest warrant of October 15, 1958.

the living room, where they identified themselves to appellant, showed him a copy of the arrest warrant, and placed him under arrest. A substantial quantity of narcotics was found elsewhere in the apartment, which, together with other items, the agents seized (R. 9a-10a, R. 76a-77a, R. 95). The other items seized included a suitcase, miscellaneous papers, petitioner's passport, and currency (R. 5a, R. 10a). That the arrest was effected under color of the invalid arrest warrant was confirmed by Agent Costa's return of execution of the warrant (R. 22a).

The foregoing facts, as stated, are undisputed. The affidavits in the proceedings on the motion to suppress were in conflict concerning other circumstances of the search:—

First, according to the "information and belief" affidavit of Assistant United States Attorney Stewart (R. 10a): The agents asked petitioner if he would permit them to make a search of the apartment. Petitioner then told one of the agents, "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." Petitioner then took the agents to his bedroom where a suitcase was found in the closet, and opened. It contained the narcotics mentioned. Petitioner then stated that this was all the heroin he had in his possession. Approximately \$8,675 was found in the apartment, and petitioner later admitted that this money represented profits which he had made in the sale of narcotics. Petitioner also later admitted that he had voluntarily turned over the seized heroin to the agents at the time that they visited his apartment to arrest him.

Second, a reply affidavit filed by petitioner's counsel, Jerome Lewis, contradicted the above Stewart affidavit, and challenged its competency as being founded solely on hearsay (R. 32a-34a). Mr. Lewis' affidavit (which he expressly acknowledged was likewise based on hearsay) stated (R. 33a-34a):

"Deponent has not submitted counter-affidavits from Jeanne Di Bella [the stepdaughter] and Mario Di Bella for it is deponent's contention that the allegations in the opposing affidavit as to the events of March 9, 1959, should not be considered by this Court for they are inadmissible.

"Deponent has conferred with both Miss Di Bella and Mr. Di Bella and was told by Miss Di Bella that on March 9, 1959, the upstairs bell rang and she opened the apartment door. A man showed her a badge and he and several other men walked into the apartment. They walked right into the living room which is adjacent to the hall corridor where her father was seated.

"Mr. Di Bella informed deponent that the agents came over to him and said they were narcotics agents. They showed him a warrant and said he was under arrest and not to leave the apartment. About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

Third, petitioner's own affidavit, filed in support of the motion to suppress (at the outset of that proceeding), averred that the agents "after exhibiting to me a warrant for my arrest * * * proceeded to make a general exploratory

examination of my apartment. They discovered * * * and seized * * * narcotics * * * and divers other items" (R. 5a).⁵

On the day following the arrest and search, petitioner was arraigned before a United States Commissioner and bail was fixed (March 16, 1959) (R. 23a-24a).

Petitioner's motion to suppress the items seized on March 9, 1959, for violation of the Fourth Amendment and of Rules 3, 4 and 41(e) of the Federal Rules of Criminal Procedure (R. 3a), was denied by the District Court. The District Court in its opinion (R. 81a) held that the search was proper as incident to a valid arrest (R. 89a), the Court's reasoning on the question of the validity of the arrest being: (1) that the five-months' old arrest warrant was valid (R. 82a-86a) because Agent Costa's complaint in support thereof (R. 7a—quoted p. 8, *supra*) had included an averment of "personal observations,"⁶ and the affidavits in support of the unsuccessful applications for a search warrant (R. 25a-31a)⁶ (which likewise had been executed some five months prior to the arrest and search) showed that those "personal observations" of Agent Costa gave him sufficient "personal knowledge" to support his arrest complaint;⁷ and (2) that "quite apart from the question

⁵ The majority opinion in the court below unexplainedly concluded (R. 95, fn. 1) that this affidavit of the petitioner, depicting a "general exploratory search" resulting in discovery and seizure of property, was "not contrary" to the Government's above-described affidavit (Stewart—R. 10a) depicting a voluntary disclosure and surrender of the property by the petitioner. The District Court's opinion made no reference to this phase of the case (R. 81a).

⁶ The District Court considered those abortive affidavits as part of the Government's case in opposition to the motion to suppress (R. 83a).

⁷ It does not appear that the Commissioner who issued the arrest warrant had been informed about the search-warrant affidavits or their contents (R. 75a).

of the propriety of the issuance of the warrant," the search of March 9, 1959 was proper as one incident to an arrest that "could . . . have" (R. 89a) been made without a warrant, pursuant to the Narcotics Act of 1956 (26 U.S.C. §7607) because the aforementioned search warrant affidavits of October, 1958 showed "that the evidence in the possession of Agent Costa was more than sufficient to give him reasonable ground to believe that DiBella had violated the Narcotics Act on August 26, 1958 and September 10, 1958" (R. 89a; see also R. 86a-89a).*

(The circumstances of the latter alleged violations as depicted in the obsolete search-warrant affidavits, to which the District Court—as well as the majority Judges in the Court of Appeals (*infra*)—attached such decisive importance, are described below.)

The majority Judges in the Court of Appeals, while affirming the denial of the motion to suppress, rejected the District Court's conclusion that the arrest warrant was valid (R. 94-97) (the dissenting opinion of Judge Waterman likewise found the arrest warrant invalid, R. 105). The Court of Appeals' reasoning on this issue was that the arrest complaint is:

" . . . particularly deficient in setting forth the sources of his information or grounds for his (Agent Costa's) belief. True, it recites that his belief an offense had been committed was grounded on his 'personal observations in this case, the statements

* The District Court made no reference to the question of the reasonableness of the actual conduct of the search or to the conflicting affidavits relating thereto (R. 81a-89a). Neither of the courts below made any decisionally significant reference to the alleged oral admissions by petitioner (R. 10a), doubtless because no issue affecting the motion to suppress was involved.

of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics,' but what other sources could there possibly be? Such a shotgun, all-encompassing enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless 'other witnesses' or the unidentified 'reports and records.' The complaint is no better than that in *Giordenello v. United States*, and the warrant is invalid for the same reasons."⁹

The majority in the Court of Appeals nevertheless sustained the search as proper incident to a valid narcotic arrest without a warrant pursuant to 26 U.S.C. §7607—reasoning, as had the District Court, that Agent Costa's "personal knowledge" shown in the old search-warrant affidavits (R. 25a-31a) gave him "reasonable grounds" for the arrest within the meaning of the latter statute (R. 97-105).

The majority in the Court of Appeals also found the search itself to be a "reasonable" one (R. 95-96, fn. 1; R. 105)—a point on which the District Court, as seen (fn. 8, *supra*), had made no finding and to which it had not referred at all (R. 81a-89a). This ruling of the Court of Appeals necessarily entailed an evaluation of the conflicting factual versions of the search as averred in the affidavits of the parties in the proceedings on the motion to suppress (R. 5a; 10a, 33a-34a); said affidavits are described and par-

⁹ The Government's Brief in opposition to certiorari raised no issue as to the Court of Appeals' unanimous determination that the arrest warrant was invalid. We therefore treat that determination as part of "the law of the case" in this Court.

tially quoted at pp. 10-12, *supra*, where we noted that the Government claimed the Agents made a consented-to and specifically-aimed search, whereas the petitioner claimed the search was not by consent and was a general exploratory one of his entire apartment.¹⁰

Judge Waterman, dissenting in the court below, joined with the majority in finding the arrest warrant invalid, and he was of the opinion both that the search could not be justified as incident to a lawful warrantless arrest (R. 105-114) and that the search itself was unreasonable in any event (R. 105, 110-114). Judge Waterman said (R. 106): " . . . we should look at the occurrence . . . with the greater particularity when, as here, the officer, unprotected by a prior valid judicial act, invades a family's permanent domicile in the night-time." Referring to the majority's view that Agent Costa had "reasonable" or "probable cause" to arrest petitioner without a warrant on the basis of the Agent's "personal knowledge" as depicted in the stale and abortive search-warrant affidavits of five months before (R. 25a-31a), Judge Waterman noted the factual contents of those affidavits and the subsequent failure of the Agents to develop any additional information unfavorable to petitioner, as follows (R. 107-108):

"What evidence is offered in this case to justify a judicial finding that Agent Costa had 'reasonable grounds' (i.e., 'probable cause') to arrest DiBella

¹⁰ Petitioner takes the position in this Court, as he did in the District Court (R. 33a-34a; and see p. 11, *supra*) and in the court below (Appellant's Br. p. 21), that the sole Government affidavit on the question of the *reasonableness* of the search as such (the affidavit of Assistant United States Attorney Stewart who was not present at the search—R. 9a-10a) lacked effective probative value because based entirely on hearsay. See also fn. 8, *supra*.

without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958 a defective arrest warrant was issued. On March 9, 1959 Dibella was arrested by three agents in the evening as he was sitting in his living room. It is claimed that during this five months' period the agents were awaiting expected additional violations, but Agent Costa could not point to a single incident in that five months' period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant."

Judge Waterman found also that the lapse of some five months between the time of the events which the majority thought gave rise to a reasonable belief in appellant's guilt, and the time of the arrest and search, "casts further doubt" on the validity of both that warrantless arrest and the subsequent search owing to the staleness of the information, which moreover had judicially been found "insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale" (R. 109-110).

As above stated, Judge Waterman found distinct reason for invalidating the search in and of itself, apart from

questions of the lawfulness of the arrest. In this branch of his reasoning Judge Waterman put the issue as follows (referring *inter alia* to *Harris v. United States*, 331 U. S. 145, and *United States v. Rabinowitz*, 339 U. S. 56) (R. 110-112):

" * * * The mere fact that a search immediately follows a valid arrest does not conclusively establish the reasonableness of that search. * * * A long and inconsistent series of cases has attempted to define the permissive area of a valid search incidental to an arrest.

.

" * * * we can discern a pattern that has eroded the homeowner's right to personal privacy in his dwelling to the point where it would seem that the entire home is subject to search by the police if armed with a valid warrant for the homeowner's arrest. * * * Therefore, now, as a result of this steady erosion, on the authority of *Harris*, as resurrected by *Rabinowitz*, a prisoner's apartment may be lawfully searched without a search warrant as incidental to his lawful arrest, unless the prisoner's situation is meaningfully distinguishable from that present in those cases. Two factors distinguish the instant case."

Judge Waterman then stated the distinguishing factors (R. 112, 113):

" * * * First, in *Harris* and *Rabinowitz* a valid warrant of arrest had been issued. Thus there had been a proper decision by a disinterested magistrate that probable cause of guilt existed. No valid warrant issued here. There is no Supreme Court case upholding the officers' acts where a home was searched

by officers armed with neither an arrest warrant nor a search warrant.

* * * * *

"Second, in further contrast to *Harris* and *Rabinowitz*, Dibella's arrest and the subsequent search of his residence occurred in the night-time.* * *"

Judge Waterman, in concluding his separate opinion, said (R. 113-114):

"Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*, but is amplifying and extending the doctrine of those cases.* * * Nor do I find persuasive the argument that such searches are necessary for the effective control of narcotics traffic. Justice Jackson, speaking for the Court, disposed of this argument in *United States v. Di Re, supra*, at 595:

* * * * *

"Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis of an exhaustive search of appellant's home.¹ To condone such activity "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest." *United States v. Rabinowitz, supra*, at 80 (Frankfurter, J.,

¹ There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant."

dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents."

Summary of Argument

1. Taken in their entirety and in their overall incidence upon the petitioner's Fourth Amendment rights, the circumstances of the arrest and search point to an unreasonable search and seizure. Our primary contention before this Court is that the conduct of the Government agents when thus viewed in its entirety was unconstitutional irrespective of the answer to the narrower question of whether the arresting agents at any time had "reasonable grounds" for a hypothetical arrest under 26 U.S.C. §7607. The answer to the latter question cannot affect the issue of constitutionality in the overall aspect mentioned, for at least two reasons: even if such "reasonable grounds" arguably existed when the agents' information was fresh, the "grounds" had staled by the time of the belated arrest and search, and this staleness takes on a significance *a fortiori* when the case is viewed as being not merely one of a stale arrest but of a warrantless search tacked onto the stale arrest; the second reason is that the overall constitutional dubiousness of the agents' conduct occurs here in the most sensitive of all Fourth Amendment search settings, namely a nighttime search of a private family's permanent dwelling. The authorities relating to stale arrests are collected in the dissenting opinion of Judge Waterman in the court below (R. 109-110); and see *Carlo v. United States*, 286 F. 2d 841, 846 (C.A. 2, 1961). The

preferred status of private dwellings in the Fourth Amendment search area is best shown by the fact that there is no case in this Court approving a search of a home where the officers had neither an arrest warrant nor a search warrant. *Harris v. United States*, 331 U. S. 145, and *United States v. Rabinowitz*, 339 U. S. 56, which are thought to go farthest in allowing search of fixed premises incident to an arrest, are readily distinguishable; both cases involved valid arrest warrants, neither (so far as appears) involved a nighttime search or any element of staleness, and *Rabinowitz* did not even involve a home, but an office open to the public. Indeed, the *Rabinowitz* formula of looking to "the total atmosphere of the case" best expresses our above mentioned chief theme herein that the search of petitioner's home was unconstitutional by reason of the overall circumstances of the conduct of the officers.

2. The provision of the Narcotics Control Act of 1956 (26 U.S.C. §7607) allowing arrests without a warrant can be of no assistance to the Government in overcoming the Fourth Amendment violations here presented. Even if the mere afterthought character of the Government's resort to this statute be deemed constitutionally unoffending in the overall circumstances of the case, the statute is nevertheless unavailing for the Government's purposes because the legislative history conclusively shows that the power to make arrests without a warrant was being given to narcotic agents solely to take care of situations of emergency or other special necessity, no such circumstances being shown in this case; indeed it would be difficult to conceive of a case more remotely removed from any such circumstances of emergency or special necessity than is this one. The

legislative history materials are presented at pages 34-36, *infra*.

3. While, as above noted, the case need not turn decisively on the technical question of whether the arresting agents had "reasonable grounds" for a hypothetical arrest without a warrant, no such grounds in any event existed to make the arrest at the time it was made. The factor of staleness once again comes into the picture, but even without that factor the "grounds" were inadequate viewed as of any prior time when they were fresher. Analogies drawn from cases like *Draper v. United States*, 358 U. S. 307 and *Jones v. United States*, 362 U. S. 257 are inapt here if only because this case at no time has involved a "reliable informant" as the source of the agents' hearsay affidavits.

ARGUMENT

POINT I

The motion to suppress should have been granted because, in their entirety and in their over-all incidence upon petitioner's fourth amendment rights, the circumstances of the arrest and search point to an unreasonable search and seizure.

A. Introductory

For the resolution of the question of the constitutionality of the search and seizure in this case we respectfully invoke the method of inquiry referred to in *Rios v. United States*, 364 U. S. 253, 255, viz., "a particularized evaluation of the conduct of the officers involved". More specifically, we invoke the principle that:

" * * * the test [of reasonableness under the Fourth Amendment] should not be limited to examination of arresting officers' conduct in making the arrest. Their conduct prior to the arrest is no less relevant. * * * " (Frankfurter, J., dissenting in *United States v. Rabinowitz*, 339 U. S. 56, 84)¹¹

Putting it in another way, our purpose in this Point I is to show that the constitutional aggrievement in this case is greater than the sum of its parts;¹² that, apart from such analytically separate segments of the case as those relating to the existence of "reasonable grounds" for a warrantless arrest under the Narcotic Act of 1956 (26 U.S.C. §7607), or the reasonable scope of the power to search incident to a lawful arrest, the case taken in its entirety is one of manifestly unreasonable search and seizure; and that, indeed, an affirmance herein by this Court would set a new high-water mark for the search powers of police officers in derogation of the Fourth Amendment—for, as Judge Waterman put it in his dissenting opinion in the court below, "There is no Supreme Court case upholding the officers' acts where a home was searched by officers armed with neither an arrest warrant nor a search warrant" (R. 112).

¹¹ The authoritativeness of this principle does not depend, of course, solely on the dissenting opinion which we have quoted. The Court customarily examines the record facts in search-and-seizure cases in the comprehensive manner suggested by Mr. Justice Frankfurter's dissent in *Rabinowitz*, *supra*. E.g., *Henry v. United States*, 361 U. S. 98; *Jones v. United States*, 362 U. S. 257; *Go-Bart Importing Co. v. United States*, 282 U. S. 344.

¹² Cf. *United States v. Rabinowitz*, 339 U. S. 56, 66 ("That criterion [Fourth Amendment reasonableness] * * * depends upon * * * the total atmosphere of the case.").

**B. Resume Of The Fourth-Amendment Incidences Of
The Government's Conduct In This Case.¹³**

First, for the purposes of "particularized evaluation" of the constitutionality of the search in this case, the relevant circumstances *immediately attendant upon the search itself* include the facts that the search was—

- (1) in a private family's permanent dwelling;¹⁴
- (2) in the nighttime;¹⁵

¹³ Our "resumé" citations of authorities in this subheading "B" are expanded under subsequent headings where several of the points of law involved are necessarily treated in more detail.

¹⁴ The specially protected status of dwellings under the Fourth Amendment in regard to searches is expressly recognized, *e.g.*, in *Chapman v. United States*, — U. S. —, 81 S. Ct. 776, 779; *Jones v. United States*, 357 U. S. 493, 498-500; *Johnson v. United States*, 333 U. S. 10, 14; *Agnello v. United States*, 269 U. S. 20, 32; *Carroll v. United States*, 267 U. S. 132, 147, 153. Especially memorable is the Court's painstaking differentiation in the case last cited (*Carroll*) between the emergency searches that may have to be countenanced for vehicles, etc., and the absence of such justification in cases of fixed premises. Noteworthy also is the fact that *United States v. Rabinowitz*, 339 U. S. 56, in easing the Fourth Amendment restrictions for searches of fixed premises without a search warrant, dealt not with a *dwelling* but with an *office* open to the public; besides, *Rabinowitz* involved an indisputedly valid arrest warrant and a *daytime* search.

¹⁵ In footnote 22, p. 28, *infra*, we note the special nighttime search provision of the Narcotic Act of 1956 (18 U.S.C. §1405), and we there remark upon its doubtful constitutionality. In any event, the provision is not operative in this case because no search warrant pursuant thereto (indeed, no search warrant of any kind) was ever issued herein. It is therefore pertinent to refer to the traditionally disfavored status of nighttime searches as codified by F. R. Cr. P. Rule 41(c) and to the decisions which recognize that tradition. *E.g.*, *Jones v. United States*, 357 U. S. 493, 498-499 (commenting with special severity upon "nighttime intrusion upon a private home" and remarking that F. R. Cr. P. 41(c) "is hardly compatible with a principle that a search without a warrant can be based merely upon probable cause."); *Davis v. United States*, 328 U. S. 582, 592-593 (repeatedly emphasizing that the search involved was dur-

(3) without a search warrant;¹⁶

(4) not incident to execution of a valid warrant of arrest;¹⁷ and

(5) conducted unlimitedly throughout the entire space of the dwelling by at least five agents, i.e., not confined to the person of the petitioner or to objects or space within his immediate control. (R. 114, fn. 1)¹⁸

Second, for the purposes of such "particularized evaluation" concerning the conduct of the officers *prior to the arrest and search*, the relevant circumstances include facts pointing to the bad faith of the officers, i.e., that their real

ing "business hours"); *Hanna v. United States*, 260 F. 2d 723, 725 (C.A. D.C. 1958); *Wrightson v. United States*, 222 F. 2d 556, 560 (C.A. D.C. 1955); *Calabonette v. United States*, 208 F. 2d 264 (C.A. 6, 1953); *Distefano v. United States*, 58 F. 2d 963 (C.C.A. 5, 1932). See also "Notes" 32-35 in U.S.C.A. Anno. to F. R. Cr. P. 41. In view of the foregoing, there would seem to be little force in the Government's statement in its brief in opposition to certiorari herein (p. 9) that " * * * this Court has never indicated that the validity of an arrest at nighttime depends upon any greater showing than the probable cause necessary for arrest at any other time". It is the combination of the *search* and the *arrest* to which it is incident that presents the issue of Fourth Amendment reasonableness here. Rule 41(c), it should not be forgotten, was promulgated under the authority of this Court.

¹⁶ As noted by Judge Waterman in the court below (R. 112), there is no case in this Court upholding the search of a home by officers having neither an arrest warrant nor a search warrant.

¹⁷ *Ibid.*

¹⁸ Cf. *Go-Bart Importing Co. v. United States*, 282 U. S. 344; *United States v. Lefkowitz*, 285 U. S. 452. See also Mr. Justice Frankfurter's analysis in *United States v. Rabinowitz*, 339 U. S. 56, 72-76 (dissenting op.) of the question as to the reasonableness of a search which is sought to be justified by the factor of the closeness of the items to the person of the suspect. Both of the conflicting versions of the physical circumstances of the search in this case (R. 5a, 10a, 32a-34a) indicate that the search went far afield indeed from the immediate physical area under the petitioner's actually effective control.

motive was to make not an arrest but a general exploratory search¹⁹ free of advance judicial scrutiny.²⁰

(1) The invalid arrest warrant had remained unexecuted for some six months. This occurred through the voluntary choice of the officers, *i.e.*, there is no claim that the warrant could not have been executed at any time in the interim. While the Government claimed (solely by affidavit of the Assistant United States Attorney, not by any affidavit or testimony from any of the arresting or searching Agents or from any other Agent assigned to the investigation) that the arrest was deferred in hopes of uncovering other implicated persons (R. 17a), the Government also admits that these hopes remained unfulfilled at the time of the search (*ibid*), and it makes no claim of having turned up any new unfavorable information about the petitioner prior to the search and arrest. Cf. the emphasis on the absence of proof of recent violation in *Go-Bart v. United States*, 282 U. S. 344, 357-358. In fact, the Government saw fit not to put into the record of the proceedings on the motion to suppress any affidavit or testimony from any of the Narcotic Agents on any phase of the case, except the abortive old search-warrant affidavits made five months before the search and arrest (R. 25a-31a). Cf. the rule as to the Government's burden of proof in search-and-seizure cases as stated in

¹⁹ The principle condemning such searches is recognized even by *United States v. Rabinowitz*, 339 U. S. 56, 62 and *Harris v. United States*, 331 U. S. 145, 149-150, 153. See also, *e.g.*, the *Go-Bart* and *Lefkowitz* cases cited in fn. 18, *supra*; *Marron v. United States*, 275 U. S. 192, 195; *Gouled v. United States*, 255 U. S. 298, 309; *Boyd v. United States*, 112 U. S. 616, 623-624.

²⁰ Cf. Judge Waterman's dissenting opinion in the court below (R. 114): " * * * To condone such activity 'is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.' "

McDonald v. United States, 335 U. S. 451, 455-456. This long delay in executing the invalid arrest warrant,²¹ accompanied by no satisfactory probative explanation for the delay or for the choice of the particular time of the actual arrest and search by a far larger number of agents than were conceivably needed for accomplishing the arrest, is a weighty factor in showing the officers' bad-faith motivation to by-pass judicial safeguards against a general exploratory search of petitioner's entire dwelling in the nighttime.

(2) Further attesting the officers' bad-faith motivation (and, we are obliged to point out, reflecting dubiously also upon the Government's position in defending the officers' conduct), is the fact of the officers' knowledge, at the time of the search, that a search warrant had been judicially denied to them five months previously upon the very same averments (in the old search-warrant affidavits—R. 25a-31a) now claimed to have justified the warrantless arrest to which is sought to be "tacked" the warrantless search.

(3) The Record is barren on the question of why the agents did not, or could not, apply for another search warrant or arrest warrant or both, prior to the arrest and search. There is no showing of any need for speed in making the arrest or search on the night of March 9, 1959. There is no claim of anticipated flight of petitioner or of anticipated disposal by him of any contraband or evidentiary items. Cf. *Jones v. United States*, 357 U. S. 493, 499-500, anticipating the "grave constitutional question" that "would confront" the Court in a case involving a "force-

²¹ The authorities pertaining to the issue of such delay were noted by Judge Waterman in the court below (R. 109-110) and are more extensively presented in this brief at pp. 42-45, *infra*.

ful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought . . .” In emphasizing the circumstances above recited in this paragraph, we are not unmindful of the overruling of *Trupiano v. United States*, 334 U. S. 699 (requiring a search warrant on the basis of the “practicability” of procuring it although the search is sought to be justified as incident to a valid arrest) by *United States v. Rabinowitz*, 339 U. S. 56, 66; we do not understand that *Rabinowitz* excludes absolutely and unqualifiedly all consideration of the *relevancy* of the test of “practicability” which *Trupiano* treated as *decisive*; that is, under the theme of the “total atmosphere of the case” which *Rabinowitz* prefers as the test of Fourth Amendment reasonableness, the “practicability” issue presented upon our facts seems to us important in the overall circumstances of this particular case.

(4) The official disregard for Fourth Amendment restrictions in this case appears in an especially striking light when the circumstances preceding the search are considered together with those which followed it. The arrest was undisputedly made under color of the invalid warrant of arrest—the stale warrant which was five months old and had been obtained upon averments (R. 7a) incomparably less adequate than those (R. 25a-31a) upon which the search warrant had been refused (by another United States Commissioner) just around that same time. In the proceedings on the motion to suppress, the Government’s attorney, in open court, disassociated himself from that stale arrest warrant with a frank expression of distaste for it (“I am very sorry that the warrant was ever issued, but it

is too late"—R. 78a), but he argued that the search of March 9, 1959, was nevertheless lawful on the ground that the arrest "could have" (*ibid*) been made without a warrant under 26 U.S.C. §7607 because Agent Costa had the statutory "reasonable grounds" to believe petitioner was guilty of the offenses attributed to him in the abortive search-warrant affidavits of September, 1958 (R. 25a-31a). Thus, in a case where a judicial officer five months earlier had expressly declined to find probable cause (for a search),²² when furthermore the only arrest warrant in the case was long-since-stale and was in effect disavowed by the Government in open court (and was ultimately found invalid by the court below), and where absolutely nothing is adduced by the Government by way of fresh or additional justification for either arrest or search five months later, the stale arrest and the sweeping exploratory nighttime search of a private dwelling made incident thereto are opportunistically sought to be justified by an afterthought reliance on a hypothetical warrantless arrest that "could have" been made under supposed statutory authority. If this were a case in which the overall pattern of the conduct of the Government's officers did not so overwhelmingly negate the good faith of their post-factum reli-

²² The Fourth Amendment requirement of probable cause applies, of course, to both arrest and search warrants. *Giordenello v. United States*, 357 U. S. 480, 485-486. And it is important to note that the refusal of the search warrant in September 1958 cannot be explained as due to the request for a *nighttime* warrant, because it is to be presumed that the Commissioner knew the provisions of 18 U.S.C. §1405 (adopted as part of the Narcotic Act of 1956) permitting nighttime search warrants in narcotic cases free of the restrictions of F. R. Cr. P. Rule 41(c) as to "positive" averments concerning the location of property sought by the search. Query, whether 18 U.S.C. §1405 is itself constitutional or could have any constitutional impingement on a case like the instant one. As noted in our fn. 15, p. 23, *supra*, the latter statute has had no actual operation in this case.

ance on a power of warrantless arrest, if it were a case of convincingly good-faith Government action to dispense with an arrest warrant on *some* basis of needful practicability and with *some* show of non-staleness, if it were not instead simply a case of opportunistic afterthought rationalization to justify brushing away the constitutional "inconveniences" which the Agents had in fact already experienced in this very matter when they were refused a search warrant, the Government could contend with better constitutional grace for its right to stand on a warrantless arrest under 26 U.S.C. §7607.

(5) One of the issues on which the majority Judges and Judge Waterman disagreed in the court below was whether in fact Agent Costa had "reasonable grounds" under 26 U.S.C. §7607 to make a hypothetical warrantless arrest on March 9, 1959 (R. 97-105, 105-110). The majority found that the old search-warrant affidavits showed the Agent had sufficient "personal knowledge" for this purpose consisting of his asserted knowledge of the alleged offenses of August and September 1958 (R. 97-105). Judge Waterman concluded (R. 105-110) that Agent Costa's aforesaid "knowledge" was insufficient because it consisted of hearsay originating with a narcotics peddler (Panzarella) who was an alleged customer of petitioner corroborated solely by Costa's observation of petitioner in the company of Panzarella prior to two sales made by the latter to Moynihan, a Narcotic Agent colleague of Costa's—it being nowhere shown that Panzarella was a "reliable informant" or a "trustworthy 'special employee'" (R. 107-108). Cf. *Draper v. United States*, 358 U. S. 307, 312-313; *Jones v. United States*, 362 U. S. 257, 269-271. Petitioner's position concerning this issue of Agent Costa's "reasonable

grounds" for a warrantless arrest is that, even if this Court agrees with the majority Judges of the court below that Costa did have such grounds, the search was unreasonable for all of the other reasons enumerated in our preceding pages, i.e., unreasonable when tested in the "total atmosphere" of the case. To be sure, we do also urge that, as Judge Waterman below concluded, Agent Costa did not have such "reasonable grounds", a topic which we treat separately in our Point II, *infra*, and on that additional basis we respectfully maintain that there could be no valid warrantless arrest, hypothetical or otherwise, in this case on March 9, 1959, under the supposed authority of the Narcotic Control Act of 1956 (26 U.S.C. §7607). We maintain also (see our full argument on the point at pp. 38-45, *infra*) that neither the latter statute nor any conceivable statute could *constitutionally* justify the (hypothetical) warrantless arrest and the subsequent search incident thereto in this case under all the circumstances presented, because no statute could constitutionally put into the hands of police officers the "very dangerous amalgamation of powers" (cf. *Giles v. United States*, 284 Fed. 208, 214 (C.C.A. 1, 1922)) that would thereby arise. For the circumstances presented, in their overall aspect as above shown, are ones in which the United States Commissioner is "evicted from his judicial function" (*ibid*), and the Narcotics Agent in effect becomes the judge of the existence of probable cause, making the arrest whenever he pleases and as an incident thereto searching a suspect's dwelling whenever he desires, irrespective of the time of day.

Turning now to a more detailed treatment of the pertinent legal authorities which bear upon the above described overall incidences of the search in this case, we treat first

the questions relating especially to the Narcotics Act of 1956.

- C. The Provision Of The Narcotic Control Act Of 1956 Allowing Arrests Without Warrant Upon "Reasonable Grounds" (26 U.S.C. §7607) Does Not Confer Any Greater Power On Narcotic Agents Than Is Enjoyed By Other Federal Arresting Officers Having Statutory Power To Make Arrests Without Warrant. The Constitutional Test Of Probable Cause Is Not Overborne By Such Statutes. To Give The Narcotic Act The Effect Needed In Order To Sustain The Government's Over-All Conduct In This Case Would Be To Make That Statute Superior To The Fourth Amendment. That Congress Had No Such Intention Is Amply Shown By The Legislative History Of The Statute.**

Nothing is more essential for the proper disposition of the constitutional issues of this case than the preserving of the correct perspective as to the effects herein of the provision of the Narcotic Control Act of 1956 which allows arrests without a warrant (26 U.S.C. §7607). This statute (quoted at pp. 5-6, *supra*) is no "Open Sesame" for the federal narcotic police in their perennial striving towards some autonomous or sovereign kind of preferred constitutional status in the area of arrest and search.²³

The circumstances of this case are a sobering illustration of the way in which the Federal Narcotic Bureau aggrandizingly administers the 1956 arrest provision. The aggrandizing thrust in this case is the more disquieting

²³ In the Congressional debates on the bill which became the Narcotic Control Act of 1956 (see our full discussion of the legislative history of the statute, *infra*) the theme above referred to, namely, the persistent effort of the Federal Narcotic Bureau and its proponents, to expand the "enforcement" powers of that agency, was impliedly noted with expressions of the strongest concern by Senators Lehman and Morse. *E.g.*, 102 Congressional Record (84th Congress, 2nd Session), pp. 9034-9047, 9251, 9302-9304.

because of the almost off-hand manner in which the 1956 provision is invoked, *i.e.*, the afterthought character of the Government's reliance in this case on 26 U.S.C. §7607 as a means of rescuing a situation that the agents had mishandled. Both the original mishandling, and the afterthought attempt at rehabilitation of the situation, arise from an official attitude of implicit supra-constitutionalism.

As respects what we have termed the afterthought character of the Government's reliance on 26 U.S.C. §7607, the few judicial expressions which we have been able to find concerning governmental pretensions of this sort are worth noting. We are aware, of the *dictum* in *Giordenello v. United States*, 357 U. S. 480, 488 that, although the arrest warrant involved was held invalid, "this is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant". The *Giordenello* arrest situation, however, was a far different matter from the present one. There the invalid arrest warrant was based on a complaint alleging an offense occurring on the very same day that the warrant was issued (357 U. S. 481); and the warrant was executed on the very next day (357 U. S. 482). Nor did it appear in *Giordenello* (as we maintain it does here) that "reasonable grounds" for the arrest did not exist in any event. The "total atmosphere" in *Giordenello* bears no faintest resemblance to that in our case.

Much more to the point, we submit, on the question of the Fourth Amendment incidence of such "afterthought" reliance on warrantless arrests that "could have" been made, are the following cases:

In *Jones v. United States*, 357 U. S. 493, the agents had a daytime search warrant and no arrest warrant. They

did not use their daytime search warrant. The Court found that, on the record, the Government's action had depended not on any search incidental to an arrest but on an assertion of probable cause as to commission of an offense and existence of contraband, and this afterthought rationalization the Court declined to accept. In *Go-Bart Importing Co. v. United States*, 282 U. S. 344, the Court disapproved a search mainly as being of unreasonable scope; while it also observed that the prohibition agents had sufficient information to make an arrest without a warrant, nevertheless it disapproved the search for the additional reason that it was incident to an invalid warrant of arrest. In *United States v. Pollack*, 64 F. Supp. 554, 558, (D.N.J., 1946—per Forman, J.), the Court likewise rejected a similar "afterthought" attempt by the Government to rely on an unused and claimedly valid authority to make an arrest.

In the present case, in its Brief in Opposition (p. 9), the Government has cited *Stallings v. Splain*, 253 U. S. 339, 342, and *United States v. Rabinoicitz*, 339 U. S. 56, 60, for the proposition that " * * * this Court has indicated that, even when law enforcement officers have made an arrest pursuant to a warrant which was later found insufficient to authorize it, nevertheless the arrest is valid as long as the officers in fact had probable cause". However, in *Stallings*, the original arrest process was held lawful, hence any expression in the case on the permissibility of an afterthought arrest on other grounds would be *dictum*. Even as to such *dictum*, however, the only bearing of the *Stallings* case on the issue is in the factual peculiarities of that case, i.e., it involved the circumstance that, subsequent to the original arrest, new and additional legal cause for detain-

ing the prisoner had arisen (through the institution of removal proceedings) (253 U. S. 343). As regards the Government's citation of the *Rabinowitz* case on this point, it is of even less avail than the *Stallings* case, for the only supposedly pertinent reference in *Rabinowitz* (339 U. S. 60) is to the power of making an arrest upon probable cause that a felony was being committed *in the very presence of the arresting officers*.

All of which reflects the well-known fact that nothing in the decided cases dealing with the meaning of "reasonable grounds" under the Narcotic Act permits any other conclusion than that the statutory test stated in those words is the same as the test of "probable cause" under the Fourth Amendment. *E.g.*, *Draper v. United States*, 358 U. S. 307, 310, fn. 1; *United States v. Kancso*, 252 F. 2d 220 (C.A. 2, 1958); *United States v. Volkell*, 251 F. 2d 333 (C.A. 2, 1958), cert. den. 356 U. S. 962.

The legislative history

The legislative history of the Narcotic Control Act of 1956 (26 U.S.C. §7607) confirms that Congress had no intention of creating a form of the arrest power that would mark any new extension whatsoever into the area protected by the Fourth Amendment. On the contrary, the legislators were told by the chief sponsor of the bill that narcotic agents were simply to be given powers of warrantless arrest equivalent to those already permitted to other federal officers.²⁴ Thus, in presenting the legislation on the floor

²⁴ The Narcotic Act arrest provision in question is therefore to be deemed to have been modeled after statutes none of which import any power of arrest inconsistent with the "probable cause" requirement of the Fourth Amendment. Those statutes are 8 U.S.C. §1357 (in connection with which see 8 U.S.C. §1324) (immigration and naturalization officers); 14 U.S.C. §89 (Coast Guard); 18 U.S.C. §3052 (F.B.I.) and §3053 (United States Marshals) (see also 18 U.S.C. §3054-§3056, inclusive); 26 U.S.C. §7608 (Internal Revenue Officers).

of the Senate, Senator Daniel stated, concerning the new arrest provision, not only that "the purpose is to give these law enforcement officers status comparable to that now held by agents of the Federal Bureau of Investigation and other federal enforcement officers", but he also went much farther in reassuring the Senate by depicting the provision as one limited to a right to "make arrests without warrant for violations committed in their presence". 102 Congressional Record (84th Congress, 2nd Session) 7284.²⁵ Senator Daniel also obtained leave to read into the record a "Report of Inter-departmental Committee on Narcotics to the President (February 1, 1956)," which made it particularly explicit that the prime purpose of the sponsors of the proposed new arrest provision for narcotics cases was to enable the agents to deal effectively with those violations as to which emergency action is necessary: "Even the shortest delay incident to obtaining a warrant from a magistrate under the most favorable circumstances would be fatal to many narcotic cases. Much of the business is in neighborhoods where alarms are quickly spread; much of the activ-

²⁵ Senator Daniel was speaking of the bill S. 3760, whose section 1408 was in all substantial respects identical with the law as finally adopted. 102 Congressional Record, p. 7285. In connection with Senator Daniels' above noted over-simplified description of the proposed provision as one seemingly dealing only with violations committed in the presence of narcotic agents, see the inartistic language of a report by the Sub-committee on Improvements in the Federal Criminal Code of the Senate Judiciary Committee, which was read into the Congressional Record during the debate, and where the following peculiarly-phrased statement appears: " * * * when federal agents see the violation occur or have probable cause to believe that it is occurring, and in cases of consent searches, the agents should be permitted to make arrests without search warrants. * * *". 102 Congressional Record 9014, columns 1-2. Later in the debate, Senator Daniel again told the Senate that the purpose of the proposed new arrest provision was to allow narcotic agents "to proceed in the way that other law enforcement officers are now required to do". 102 Congressional Record 9016.

ity of narcotic criminals is in the nighttime and on week-ends, or at other times when a magistrate cannot be reached without delay". 102 Congressional Record 9017, at 9020.²⁶ The reports of the Senate and House Committees, and of the Conference Committee, shed no further significant light on the legislative intent, with the single exception of House Report No. 2388 which echoed the idea that the proposed new arrest (and search) provisions were needed to deal with emergency situations: " * * * the enforcement officers have been required to secure an arrest warrant, even though circumstances indicate the impracticability of such a procedure. The delay involved in obtaining the warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. * * * " House Report No. 2388, 84th Congress 2d Session, printed in U. S. Code Congressional and Administrative News (84th Congress 2d Session, 1956) pp. 3274 at 3283.

The foregoing is believed to be all of the legislative history material that is of pertinence for present purposes.

Both the text and the legislative history of 26 U.S.C. §7607, then, and the few pertinent judicial expressions which have appeared on the subject, point inescapably to the conclusion that this provision for narcotic arrests without a warrant was never intended to place in the hands of the narcotic agents an untrammelled discretionary authority to utilize such arrest powers indiscriminately in any

²⁶ While the statement above last quoted may ambiguously have referred to both search warrants and arrest warrants, the distinction was not made clear in the text of the quoted report. The fact remains that the legislators were being told that the proposed new powers were needed for emergency cases.

case where probable cause exists to believe that an offense has been committed, irrespective of its remoteness in time, or irrespective of all other surrounding circumstances of the case which would favor applying for a warrant. The legislative intent could scarcely be more explicit that the new power was being given to narcotic agents in order to meet the practical necessities of those cases where the obtaining of an arrest warrant might not be readily feasible or safe and the quarry might escape apprehension in the meantime.

It would, therefore, appear that the mere existence of 26 U.S.C. §7607 cannot in itself exert one iota of legal force to validate a narcotic arrest which, in the absence of that statute, would be violative of the Fourth Amendment. Congress did not and could not have contemplated what the Fourth Amendment would not countenance, the fearsome "amalgamation of powers" that is portended by the use sought to be made of 26 U.S.C. §7607 in this case of a warrantless nighttime search of a private dwelling incident to a warrantless arrest.

D. Since The Narcotic Act Of 1956 Adds And Can Add Nothing To The Validation Of The Over-All Fourth Amendment Incidences Of The Search In This Case, The Search Is To Be Tested By The Same Constitutional Standards As In Non-Narcotic Cases. Affirmance Of The Judgment Below Would Require An Extension Of The Right Of Search-Incident-To-Arrest That Would Be Without Precedent In The Decisions Of This Court And Would Reduce The Fourth Amendment To Its Lowest Ebb As A Protection For The Peoples' Private Dwellings Against Unreasonable Searches, Including Those Conducted In The Night-time And Those Without Any Advance Judicial Approval Of Any Kind.

We note once again Judge Waterman's observation in his dissenting opinion in the court below (R. 112) that there is no decision of this Court approving a search of a private home where the officers had neither an arrest warrant nor a search warrant. What is there about this case that commends it to this Court as the vehicle for approving such a species of search for the first time in the Court's history? Not only does the case lack any special circumstances whatsoever favoring its selection for this extraordinary purpose, but on the contrary, it presents overwhelming circumstances which render it positively repellent for such purpose. Let us compare this case on its facts with the leading decisions of this Court dealing with searches of fixed premises incident to an arrest—keeping before us the main factual features of this case, namely, that a search warrant had been refused, that an invalid arrest warrant had been issued, that the arrest (under color of the invalid warrant) came after the matter had staled for some five months with no new unfavorable showing of any kind against the suspect, that the arresting agents invaded a private dwelling in the nighttime, that they conducted what

can scarcely be regarded as anything other than a general exploratory search of the entire dwelling, and that the Government has made no showing whatsoever to rebut the obvious indications that the stale arrest was merely the pretext for just such a free-rummaging search of the petitioner's home.

Consensus indicates that *Harris v. United States*, 341 U. S. 145 and *United States v. Rabinowitz*, 339 U. S. 56 represent the farthest reach which this Court has allowed to the power of searching fixed premises without a search warrant as an incident to an arrest. Some of the plainly distinguishing features between those two cases and our case have been mentioned earlier in this brief. Let us recapitulate and enlarge upon those distinctions. *Harris*, it is true, involved a search of a dwelling, as does our case, but the search was incident to an undisputedly valid warrant of arrest, and the Court was at special pains to point out that the officers conducted the search in good faith, i.e., they were not engaged in a general exploratory search (331 U. S. 149-150, 153). The Court moreover laid special stress upon the existence and good-faith use of the valid arrest warrant, saying that "This is not a case where law enforcement officials have invaded a private dwelling without authority and seized evidence of crime * * * here the agents entered the apartment under the authority of lawful warrants of arrests * * *" (331 U. S. 153). Nor does it appear that the search in *Harris* was during the nighttime. It likewise does not appear that the execution of the warrant in *Harris* was stale or unduly delayed.

Rabinowitz did not even involve search of a *home*, but of an *office*, which the Court expressly noted was a public

office (339 U. S. at 64). The Court likewise expressly noted that the search was a limited one in point of space and that the entire office premises consisted of only one room (339 U. S. at 60-64), the search being confined to that one room, which was used for the actual conduct of the criminal activity involved (339 U. S. 64). Also, *Rabinowitz* like *Harris* involved an undisputedly valid arrest warrant to which the search was incident. And it affirmatively appears in *Rabinowitz* that the execution of the arrest warrant was diligently prompt, not stale, the Government having obtained its first incriminating information concerning the suspect on February 1, 1943, its first solid proof of guilt on February 9, and the arrest warrant being issued and executed on February 16; moreover, the Government knew that the suspect had been convicted on a plea of guilty for the same or a similar offense in 1941. Nor is it to be overlooked that it is the *Rabinowitz* case which formulated the test of Fourth Amendment reasonableness on which we principally rely in this Point I of our argument, namely that the reasonableness of the search is to be tested by "the total atmosphere of the case" (339 U. S. at 60).

As for *Abel v. United States*, 362 U.S. 217, of the numerous features which distinguish that case from ours, we note only the following: There was a warrant of arrest which was of unquestionable validity, the search was not in the nighttime, the search was of a hotel room rather than of a permanent family domicile, and the hotel occupancy was susceptible of being viewed as having been legally "abandoned"; the Court emphasized also the propinquity of some of the items seized to the actual physical person of the suspect.

Of the cases in which this Court has disapproved searches of a dwelling incident to an arrest, we note the following: *Jones v. United States*, 357 U. S. 493, involved a nighttime search of dwelling premises where an illegal still was found. The agents had a daytime search warrant and no arrest warrant. Confederates of the suspected owner of the dwelling were arrested while engaged in commission of the offense at the scene, but the Court found that the Government's action in making the search had not been incident to this arrest, but on probable cause (without a nighttime search warrant) to believe that the offense was being committed and that contraband existed on the premises; this the Court found insufficient to validate the search. As regards *McDonald v. United States*, 335 U. S. 451 and *Johnson v. United States*, 333 U. S. 10, both of which disapproved a search of a dwelling incident to an arrest, and where the Court gave important if not decisive weight to the absence of any showing of justification for failure to obtain either an arrest warrant or a search warrant, we have not seen it suggested that the overruling of *Trupiano v. United States*, 334 U. S. 699 by *United States v. Rabino-witz*, 339 U. S. 56, was intended to abrogate the aforementioned feature of the *McDonald* and *Harris* cases. Nor, so far as we are aware, has any subsequent decision impaired the authoritativeness of the statement in *United States v. Lefkowitz*, 285 U. S. 452, 464 that "the authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant * * *. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are per-

missible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime * * *." And see *Jones v. United States*, 362 U. S. 257, 270-271: " * * * In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need for search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded."

In our case, the narcotic agents chose to conduct the search upon no authority other than the "tacking" of the search upon the stale arrest warrant which was five months old. This factor of staleness was discussed at some length by Judge Waterman in his dissenting opinion in the court below (R. 109-110):

"The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority holding here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But,

on the other hand, execution should not be unreasonably delayed. *United States v. Joines*, 258 F. 2d 471 (3 Cir.), *cert. denied*, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest. See *United States v. Joines*, *supra* (21 days); *Seymour v. United States*, 177 F. 2d 732 (D. C. Cir. 1949) (6 days); *State v. Kopelow*, 126 Me. 384, 138 Atl. 625 (1927) (7 days); *State v. Nadeau*, 97 Me. 275, 54 Atl. 725 (1903) (23 days); *Kent v. Miles*, 69 Vt. 379, 37 Atl. 1115 (1897) (17 days). The permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey v. United States*, 261 F. 2d 870, 872 (5 Cir. 1958), *cert. denied*, 359 U. S. 969 (1959), the court stating that the arresting officer 'may defer the arrest for a day, a week, two weeks, or perhaps longer.' Surely in the present case where no new evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale 'probable cause.' I would hold that the arrest of a person who has been under surveillance for seven months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent

search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale."

In addition to the authorities cited by Judge Waterman in the above quotation, we call attention to *State v. Mahoney*, 196 Wis. 113, 219 N. W. 380 (1928) (arrest upon a warrant—to be effected "without unreasonable delay"); *Robinson v. Lovell*, 238 S. W. 2d 294 (Tex. Civ. App.) (arrest upon a warrant—arresting officer must act as a reasonably prudent officer under the circumstances in avoiding undue delay in making the arrest, lest he be liable to prosecution for false imprisonment); *City of Cleveland v. Strom*, 67 N. E. 2d 353 (Ohio Municipal Court) (arrest upon a warrant to be executed "within a reasonable time"). And see the recent decision in *Carlo v. United States*, 286 F. 2d 841, 846 (C.A. 2 1961), referring to the above quoted portion of Judge Waterman's dissent herein, and saying:

" * * * Law enforcement officers have a right to wait in the hope that they may strengthen their case by ferreting out further evidence or discovering and identifying confederates and collaborators. But every time there is delay in the making of the arrest and there is a search made as incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search. See *United States v. Lefkowitz*, 1932, 285 U. S. 452, 467, 52 S. Ct. 420, 76 L. Ed. 877; *Henderson v. United States*, 4 Cir., 1926, 12 F. 2d 528, 51 A.L.R. 420; *Worthington v. United States*, 6 Cir., 1948, 166 F. 2d 557, 566; *Clifton v. United States*, 4 Cir., 1955, 224 F. 2d 329, 330; *United States v. McCunn*, D. C. S. D. N. Y., 1930, 40 F. 2d

295, 296; *United States v. Chodak*, D. C. D. Md. 1946, 68 F. Supp. 455. In other words, the delay in making the arrest is one of the factors to be taken into consideration when the time comes for a judicial determination of the question of whether or not the search was 'reasonable.' The mere fact that the arrest was not unlawful does not give law enforcement officers carte blanche to rummage about at will in any home or other place where an arrest is made and then seek to justify their conduct by a blanket statement that the 'search' made by them was incidental to an arrest. All the attendant circumstance, including the delay in making the arrest and the reason for such delay must be taken into consideration."

See also *Hobson v. United States*, 226 F. 2d 890 (C.A. 8, 1955), holding that there was considerable doubt whether probable cause existed on April 20, 1955 for the arrest without a warrant of a narcotic suspect who was known to have made an illegal sale on March 22, 1955; and *Wrightson v. United States*, 222 F. 2d 556, 560 (C.A.D.C. 1955), where the court spoke disapprovingly of a search of a residence, without a warrant, twelve days after the alleged offense.

It is submitted that the conduct of the Government officers taken in its entirety—and irrespective of whether they might technically be said to have had "reasonable grounds" within the meaning of 28 U.S.C. §7607 to have made a non-stale arrest within a due and reasonable time after the commission of the alleged offenses and the issuance of the old arrest warrant—violated the Fourth Amendment provision against unreasonable search and seizure.^{26a}

^{26a} The court below (R. 104) cited *Williams v. United States*, 273 F. 2d 781 (C.A. 9, 1960) as sustaining an arrest on "reasonable grounds" where the arrest warrant used proved to be invalid. Actually the invalid warrant was for search not arrest, there was no arrest warrant, and the arrest (by a state officer) was upheld as valid under state law.

POINT II

The search was invalid because in any event Agent Costa did not have "reasonable grounds" to make the hypothetical warrantless "Narcotic Act" arrest to which the search is sought to be "tacked" as an after-thought.

Did Agent Costa have "reasonable grounds" or "probable cause" (they are the same—see p. 34, *supra*) for arresting the petitioner, or for obtaining a warrant for his arrest,²⁷ even during the period of time when the alleged facts as to commission of offenses by the petitioner were sufficiently fresh to justify acting upon them for such purposes? And, even if such "reasonable grounds" did exist at some such fresher stage of the case, did they still exist on March 9, 1959 when the stale and invalid arrest warrant was executed?

The majority judges in the court below held that such reasonable grounds did exist irrespective of the factor of staleness or delay in the making of the arrest ("• • • we do not believe that the delay eradicated from Costa's mind the knowledge that he had received by September 1958 of appellant's apparent violations of the Narcotics Laws"—R. 104). By this simplistic treatment of the factor of the delay in the making of the arrest, the majority judges in the court below have brushed aside the importance of that factor, not only in its bearing upon the validity of the

²⁷ It has been expressly stated that "If the information at the disposal of an arresting officer is wholly insufficient to justify the issuance of a warrant for arrest, an arrest in such a case with an invalid warrant or with no warrant at all, would be an illegal arrest". *Worthington v. United States*, 166 F. 2d 557, 562 (C.C.A. 6, 1948).

arrest itself, but in its bearing on the over-all action of the officers in using the stale arrest as a pretext for a warrantless exploratory search.

There is no need for us to repeat here our rather extensive presentation of the authorities pertaining to this matter of delay in the making of an arrest. See pp. 42-45, *supra*. We therefore limit our remaining discussion of the question of "reasonable grounds" for the arrest to that aspect of the question which concerns the circumstances as they existed during the time period within which the agents might have made a non-stale arrest. The remaining question, in other words, is whether the facts of which Agent Costa is supposed to have had "personal knowledge" were sufficient *at any time* to give him "reasonable grounds" for an arrest without a warrant under the Narcotic Act (26 U.S.C. §7607). Those facts, it will be recalled, were the ones that were averred by Agents Costa and Moynihan in their abortive search-warrant affidavits of October 1958. Those affidavits described alleged offenses by petitioner on August 26 and September 10, 1958 (R. 25a-31a). The majority judges in the court below evaluated the contents of those affidavits as follows (R. 102-104):

"In the present case, Costa had not only the benefit of his own observations of the contacts and activities of appellant and Panzarella, but he also had the benefit of the information given him by Agent Moynihan as to the sales of heroin by Panzarella to Moynihan.

"An examination of the affidavits of Agents Moynihan and Costa shows that both on August 26, 1958, and on September 10, 1958, appellant and Panzarella were under the surveillance of each agent. On Au-

gust 26, for instance, Panzarella agreed to sell Moynihan heroin, and stated that he had to contact his connection. He made a telephone call and then went with Agent Moynihan to 79th Street near Roosevelt Avenue in Jackson Heights. Moynihan saw Panzarella leave his vehicle, walk to 79th Street and 37th Avenue, and enter a green Chrysler automobile with New York license No. 6971NE. Moynihan saw Panzarella leave the Chrysler a few minutes later at 79th Street and Roosevelt Avenue, and saw Panzarella return to his vehicle, upon which Panzarella handed to Moynihan the envelope which proved to contain heroin. At the same time, Costa saw appellant enter the same Chrysler automobile and saw him drive to 37th Avenue and 79th Street, saw him meet Panzarella who then entered the Chrysler automobile. He saw the two men drive to 79th Street and Roosevelt Avenue and saw Panzarella leave the automobile. Costa then saw Panzarella walk to 78th Street and meet Agent Moynihan and hand a small envelope to him. The later tests showed that this envelope contained heroin.

"Likewise, on September 10, 1958, each agent saw approximately the same procedure followed between Panzarella and appellant. On the latter occasion, Panzarella, after being in contact with appellant, came back to Moynihan and sold him an ounce of heroin which he told Moynihan he obtained from DiBella. Appellant was seen meeting Panzarella, be with him briefly, and Panzarella was seen to immediately return to Moynihan with the heroin.

"Taking all of the circumstances together, we believe that there was ample evidence to hold that Costa had 'reasonable grounds to believe' that appellant had committed a violation of the narcotics laws. With all the information Costa had, both from

his own observation and from information received from Moynihan, Costa would have indeed been naïve if he did not believe that appellant had just provided the narcotics which Panzarella delivered to Moynihan. Although Costa's affidavit was based in part on hearsay, there was 'a substantial basis for crediting' the information given him by a fellow-agent, information which was wholly consistent with what Costa himself had observed. *Jones v. United States*, 362 U. S. 257, 269. We hold that at any time after September 10, 1958, Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics laws."

Judge Waterman, dissenting in the court below, evaluated the same affidavits as follows (R. 107):

"What evidence is offered in this case to justify a judicial finding that Agent Costa had 'reasonable grounds' (i.e., 'probable cause') to arrest DiBella without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. . . ."

The majority judges below cited *Draper v. United States*, 358 U. S. 307, 310, 313 for the doctrinal standards to be used in evaluating an officer's hearsay claim of "reasonable grounds" (R. 100-102); and they appear to have relied on *Jones v. United States*, 362 U. S. 257, 269, by way of more specific factual analogy (R. 103).

In the *Jones* case we find in the affidavit of Detective Didone seeking a search warrant, the following:

1. Detective Didone received information that Cécil Jones and Earline Richardson were involved in narcotics.
2. That they kept a ready supply of heroin in their apartment.
3. The informant mentioned that the narcotics were either on their person, under a pillow, on a dresser, or on a window ledge in said apartment.
4. The informant stated that on many occasions he had purchased drugs from Jones and Richardson in their apartment.
5. Jones and Richardson were familiar to the Detective and other members of the Narcotics Squad.
6. Jones and Richardson were narcotic addicts.
7. The same information regarding the illicit narcotic traffic conducted by Jones and Richardson had been given to Didone by other sources of information.
8. The informant had given Didone correct information on other occasions.

In our case, we find:

- a. That in August 1958, Agent Costa saw DiBella leave his premises, enter his car, drive to 37th Avenue and 79th Street, Jackson Heights, Queens, New York, where DiBella met Panzarella. Panzarella entered the automobile and was driven to Roosevelt Avenue and 79th Street in Jackson Heights, Queens. Pan-

zarella left the car and later met Agent Moynihan and gave the agent an envelope containing heroin.

- b. The same procedure was followed in September, 1958.
- c. Agent Costa, the arresting officer had been told of a statement made by Panzarella, to his fellow-agent Moynihan (who was not present at the time of petitioner's arrest), that DiBella was Panzarella's source of supply.
- d. Costa did not observe any transfer of anything between DiBella and Panzarella.
- e. Panzarella had not given Moynihan or Costa correct information on other occasions.
- f. Similar information that DiBella was a supplier of narcotics had not been given to Moynihan or Costa by other identified sources of information.
- g. DiBella was not a narcotic addict.

In *Draper v. United States*, 358 U. S. 307 and in *Jones v. United States*, *supra*, the information given to the officers came from a reliable informant. In the present case there was no proof that Panzarella's information could be relied upon and that based on previous dealings he was a reliable informant.

In *Jones v. United States*, 266 F. 2d 924, 929 (C.A.D.C.), the court said:

"The requirement that the informer be reliable stands as the only effective legal safeguard against false denunciations by irresponsible persons who may be motivated by self-interest, spite or even paranoia. The only other safeguard which remains

rests not on law but on the good will of the police officer."

In *Jones v. United States* (362 U. S. at 271), Justice Frankfurter stated:

" . . . Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough; but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. This story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history."

In our case, there was no proof that DiBella was a user of narcotics. There was no corroboration through other sources of information. The only proof adduced by the Government to corroborate Moynihan's statement to Costa, were the two observations made by Costa when he had seen DiBella and Panzarella meet. Certainly DiBella's two meetings with Panzarella were to all outside appearances a more innocent association than the two trips Henry and his confederate made in *Henry v. United States*, 361 U. S. 98.

In the *Jones* and *Draper* cases, then, the information was given by a reliable informant directly to the arresting officer. In the present case, the information was alleged to have been given by Panzarella to Moynihan who then related it to Costa. This would be hearsay upon hearsay and an unwarranted extension of the rule that hearsay may be the basis for a warrant if reasonably substantiated.

The impact of this Court's leading decisions on the issue of what constitutes "reasonable grounds" or "probable cause" for an arrest without a warrant, as applied to the facts of this case, is further developed in the dissenting opinion of Judge Waterman in the court below (R. 105-107, 108-109):

"As the majority opinion sets forth, the 'reasonable grounds' contemplated by the Narcotics Control Act, 26 U.S.C. §7607, are equivalent to the 'probable cause' required under the Fourth Amendment, *Draper v. United States*, 358 U. S. 307 (1959), and the quantity and quality of the evidence to substantiate 'probable cause' need not be as great as that required for a determination of guilt. *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725 (1960); *Henry v. United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Draper v. United States*, *supra*, *Brinegar v. United States*, 358 U. S. 160 (1949); *Carroll v. United States*, 267 U. S. 132 (1925).

"In determining whether a law enforcement officer had 'reasonable grounds' (i.e. 'probable cause') to act as he did, we should approach a resolution of the issues in the light of the historical interpretation this language of the Fourth Amendment has been accorded in the past. And, of course, we should look at the occurrence we are examining with the greater particularity when, as here, the officer, unprotected

by a prior valid judicial act, invades a family's permanent domicile in the night-time.

"The latest of the several Supreme Court summaries setting forth the philosophy underlying the meaning of 'upon probable cause' and an historical exemplification of that philosophy appears in *Henry v. U. S.*, *supra*. There Justice Douglas states, 361 U. S. 98, 101, 80 S. Ct. 168, 170:

'And as the early American decisions both before and immediately after its [the Fourth Amendment] adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day . . . [citing cases]. Its highwater was *Johnson v. United States*, *supra* [333 U. S. 10 (1948)], where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.'

"There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without an arrest warrant, or approved a search without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the instant case.

"The *Carroll* and *Brinegar* cases, *supra*, dealt with violations of the federal liquor laws. Defendants in each case were arrested on the open road while transporting liquor. In each case the arresting officer had observed the defendant at some length and could attest personally to the defendant's having handled liquor. Defendants in *Carroll* had offered the officer alcohol on a previous occasion. *Brinegar* previously had been arrested by the same

officer for illegally transporting liquor, and in the six months preceding the arrest at issue that officer had twice seen the defendant loading liquor into a car or truck.

"*Draper v. United States, supra*, dealt with the specific section of the Narcotics Control Act here involved. There the arresting officer had information from a paid 'special employee' of the Bureau of Narcotics that Draper was peddling narcotics and would arrive in Denver by train carrying a shipment of narcotics. Draper was arrested as he alighted from the train.

"In *Jones v. United States, supra*, the question of whether the magistrate who issued a warrant had sufficient competent evidence before him in the officer's affidavit to justify issuance was decided favorably to the Government. Probable cause was there found because the officer's affidavit not only set forth information given by an unnamed informer but also stated that the officer personally knew the persons informed upon, and knew they were narcotics users. Furthermore, the informer had given reliable information in the past and the information given this time was corroborated by other informants. See 362 U. S. 267, fn. 2, 80 S. Ct. 734, fn. 2.

• • • • •

"Draper, Brinegar and Carroll were arrested when there was a real need for rapid action but even in those cases more evidence justifying arrest was introduced than here. In *Brinegar* and *Carroll* additional evidence was compiled during the period of surveillance. Here no such evidence was accumulated, and the informer Panzarella was something less than the trustworthy 'special employee' in *Draper*. This case is perhaps closest to *Jones*, but

even there more corroborating evidence was introduced, and the initial invasion of the privacy of the apartment where [fol. 110a] Jones was discovered was pursuant to a valid search warrant issued by 'an independent judicial officer.'

"It is interesting to compare the facts in the instant case with those in *Henry v. United States, supra*, in which the Supreme Court refused to find probable cause. In *Henry* the arrest followed surveillance by two FBI officers. Henry and a confederate had been seen making two trips transporting cartons in an automobile from a residential section of the city to a tavern. The FBI had developed an interest in Henry because the confederate had been 'implicated in interstate shipments' and in that area there had been some whiskey stolen from an interstate shipment. Henry and his confederate were stopped during the second trip and were found to be carrying stolen radios in their car. The Supreme Court reasoned that using an auto to transport small cartons was an outwardly innocent activity, and the FBI agents could not rely in justification for their acts upon an informer's story to them that Henry's confederate was implicated in a former theft of an interstate shipment. DiBella's two meetings with Panzarella were to all outward appearances a more innocent association than the two trips Henry and his confederate were making. No invasion of one's domicile was involved in *Henry*, and the Court recognized that '*Carroll v. United States, supra*, liberalized the rule governing searches when a moving vehicle is involved.' But even under these circumstances the Court went on to say, 'But that decision [Carroll] merely relaxed the requirements for a warrant on grounds of *practicality*. It did not dispense with the need for probable cause.' (Em-

phasis supplied.) 361 U. S. 98, 104, 80 S. Ct. 168, 172. Accord, *Rios v. United States*, 364 U. S. 253, 80 S. Ct. 143 (1960). See *Eng Fung Jem v. United States*, 281 F. 2d 803 (9 Cir. 1960). Moreover, in cases where arrests without warrant have been sought to be justified as having been made upon probable cause the [fol. 111a] courts of appeal have felt constrained to discover special circumstances to justify the arrests. See *United States v. Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States v. Volkell*, 251 F. 2d 333, 336 (2 Cir.), cert. denied, 356 U. S. 962 (1958); *United States v. Walker*, 246 F. 2d 519, 527 (7 Cir. 1957). See also *Williams v. United States*, 273 F. 2d 781, 791 (9 Cir.), cert. denied, 362 U. S. 951 (1960) (informer was paid employee), relied on by the majority here."

Finally, as concerns more specifically the emphasis which the majority judges in the court below attached to the collaboration between Agents Costa and Moynihan and their mutual sharing of the stale investigative information (R. 102-103), it is to be noted that no citation of authority was given on the point. We think it is of interest that in the only two Federal cases we have found where such mutual cooperation or sharing of information by officers was found to support the existence of probable cause for an arrest, the suspects were arrested (without a warrant) at the very time and scene of the commission of the alleged offense, and by the very agents who were then and there cooperating in surveillance of the offense (indeed, were expecting its commission) and saw it prepared and consummated. *United States v. Romero*, 249 F. 2d 371 (C.A.2 1957); *United States v. Salli*, 115 F. 2d 292 (C.C.A.2 1940).

It is submitted that Agent Costa did not at any time have "reasonable grounds" to arrest the petitioner without a warrant pursuant to 26 U.S.C. §7607.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 21

MARIO DiBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 93-114) is reported at 284 F. 2d 897. The opinion of the district court (R. 81-89) is reported at 178 F. Supp. 5.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1960 (R. 115). The petition for a writ of certiorari was filed on December 9, 1960, and was granted on February 20, 1961 (R. 116; 365 U.S. 809). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order denying a motion to suppress filed before indictment is independently appealable, where the motion is directed solely at the suppression of evidence (primarily contraband narcotics) for use at a forthcoming trial and was filed after the criminal complaint, the waiver of preliminary hearing, and the binding over of the movant for grand jury action.

2. Whether, assuming the order was appealable, the arrest of petitioner was lawful and the search and seizure of narcotics incident to that arrest were reasonable.

STATUTES INVOLVED

28 U.S.C. 1291 provides:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

26 U.S.C. 7607 provides in pertinent part:

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U.S.C. sec. 1401 (1)), may—

• • • • •

(2) make arrests without warrant for violations of any law of the United States relating

to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

STATEMENT

On March 9, 1959, petitioner was arrested on a charge of violating the federal narcotics laws (R. 21-22). The following day, he was arraigned before a United States Commissioner, informed of the charge against him, and, having waived preliminary hearing, was released on bail and bound over for action by the grand jury (R. 23-24). Thereafter, on June 17, 1959, petitioner moved in the United States District Court for the Eastern District of New York to suppress, "in any criminal proceeding," evidence seized at the time of his arrest (R. 3-6). Before this motion was heard or decided by the district court, an indictment was returned against petitioner charging him with federal narcotics violations (R. 94). On November 30, 1959, the district court issued an order denying the motion, without prejudice to its renewal at the trial (R. 90).¹ The court of appeals held the order appealable (R. 94) and affirmed on the merits, finding that the arrest was lawful and the search and seizure incident to it were reasonable (R. 93-105).

¹ The opinion of the district court in support of this order was entered on November 4, 1959 (R. 81-89).

The pertinent facts relating to the arrest and the subsequent search and seizure may be summarized as follows:²

1. Starting in the latter part of July 1958, David W. Costa and Daniel W. Moynihan, agents of the Bureau of Narcotics, commenced an investigation into the suspected narcotics activities of petitioner (R. 25, 28). During the course of this investigation, agent Moynihan, posing as a narcotics buyer, met Samuel Panzarella who agreed to sell him a quantity of heroin (R. 29). At 6:00 in the morning of August 26, 1958, the agent met with Panzarella in Manhattan. Panzarella informed the agent that he wanted to telephone his source of supply. Following this call, Moynihan was told that the delivery of the heroin would take place at 8:30 a.m. (R. 29). Panzarella and Moynihan then drove to Jackson Heights, Queens, and parked on 79th Street, north of Roosevelt Avenue (R. 29).

Suspecting that petitioner was Panzarella's source of supply, agent Costa had kept petitioner's home in Jackson Heights under surveillance in the early morning of August 26th. At 7:30 a.m., Costa observed petitioner leave his home and enter a Chrysler automobile, New York license number 69 71 NE, and drive to 37th Avenue and 79th Street, Jackson Heights (R. 26).

After Panzarella left his car, agent Moynihan observed him walk to 79th Street and 37th Avenue and

² At the hearing on the motion, the district court heard oral argument by counsel (R. 53-80), and accepted opposing and supporting affidavits (R. 8-31, 32-52).

enter a Chrysler car bearing New York license number 69 71 NE (R. 29). Agent Costa also saw Panzarella enter petitioner's automobile, and followed them. They drove to 79th Street and Roosevelt Avenue where Panzarella left the car (R. 26). Both agents saw Panzarella leave the automobile and walk directly to 78th Street (R. 26, 29). Under Costa's observation, Panzarella then met agent Moynihan, who was awaiting his return. Panzarella handed the agent a small glassine envelope containing "white powder" (R. 27, 29). Subsequent tests of the "white powder" revealed it to be an ounce of heroin (R. 26, 29).

Agent Moynihan arranged a second purchase of heroin from Panzarella for September 10, 1958 (R. 26, 29). Moynihan and Panzarella met in Manhattan at 9:30 that evening, and Panzarella stated once again that it would be necessary to drive to Jackson Heights to meet his "connection" (R. 29-30). At 9:40 p.m. Panzarella placed a telephone call to his "connection" (R. 30), and then drove with Moynihan to 74th Street and Roosevelt Avenue in Jackson Heights (R. 30). Agent Costa, who was again stationed at petitioner's home, saw him leave at 11:00 p.m., and walk to 74th Street and Roosevelt Avenue (R. 26). At 11:05 p.m. Panzarella left Moynihan in the parked automobile (R. 30). Both agents observed Panzarella and petitioner meet and walk together from 74th Street to 37th Road (R. 26, 30). Shortly thereafter (11:30 p.m.), Panzarella returned to the automobile, and, enroute back to Manhattan, handed agent Moynihan a glassine envelope containing

a "white powder," later found to be heroin hydrochloride (R. 30). Panzarella told Moynihan that petitioner was his source of supply and had supplied the heroin sold to Moynihan on August 26th (R. 30).

No tax stamps were attached to the two envelopes containing narcotics that were sold to agent Moynihan on August 26 and September 10; and these narcotics were not sold pursuant to a written order form (R. 30).³

2. On October 6, 1958, agents Costa and Moynihan applied for a nighttime search warrant for petitioner's apartment on the basis of their affidavits setting forth the above facts (R. 25-31). On that same date, Commissioner Abruzzo denied the application (R. 9, 51-52, 73).⁴

³These facts are essentially a summary of the affidavits of agents Costa and Moynihan which were submitted by the government in support of its application for a warrant to search petitioner's apartment (R. 25-31; see also R. 72-73).

⁴While this record does not show the ground for the Commissioner's denial of the application for a search warrant, it was apparently, as the United States Attorney suggested at the motion hearing, "denied for failure to show the time concerned" (R. 73). The officers were seeking a nighttime warrant, but their affidavits did not allege they were "positive that the property is * * * in the place to be searched * * *" (Rule 41(c), F.R. Crim. P.). They alleged only that they had probable cause to believe that narcotic drugs were concealed in petitioner's apartment (R. 25, 28). The magistrate may have concluded that an insufficient showing had been made for the issuance of a nighttime search warrant under Rule 41(c), F.R. Crim. P., although, under 18 U.S.C. 1405(2), dealing specifically with narcotics, probable cause is enough whether the warrant is to be served during the day or night.

Thereafter, on October 15, 1958, Commissioner Epstein issued a warrant for petitioner's arrest,^{*} based upon the complaint of agent Costa, charging petitioner with the sale of heroin on September 10, 1958 (R. 21-22, 63, 73). The complaint stated that the sources of the agent's knowledge were his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics" (R. 7). For some unexplained reason, the detailed affidavits which were submitted by agents Costa and Moynihan to Commissioner Abruzzo on the application for a search warrant and which were on file in the Commissioner's office were not directly submitted to Commissioner Epstein on the application for an arrest warrant (R. 13, 72).

3. The arrest warrant, issued on October 15, 1948, was not used to arrest petitioner until March 9, 1959. As the Assistant United States Attorney explained at the hearing on the motion to suppress, the lapse of time between the procurement of the arrest warrant and petitioner's arrest was due to the fact that the agents were trying "to find out who else was associated with * * * DiBella in the narcotics traffic * * *" (R. 75-76; see also R. 17). On March 9, 1959, at approximately 8:15 p.m., agent Costa and two other federal narcotics agents (O'Connor and Murray), armed with the arrest warrant, went to DiBella's apartment to arrest him (R. 8, 76). Shortly before, the agents

^{*}Through inadvertance the warrant of arrest was dated October 6, 1958 (see R. 73-74, 82).

had seen from a neighboring building that petitioner was at home. The agents rang the bell of the apartment and the door was opened by petitioner's step-daughter (R. 9, 76). The officers immediately identified themselves, showed her their credentials, and were ushered into the apartment (R. 9, 76). The agents then identified themselves to petitioner, and showed him and his wife a copy of the warrant of arrest, which they both read (R. 9-10, 76-77). Two other agents then entered the apartment (R. 10). At this juncture, in response to an inquiry as to whether he would permit the agents to search the apartment, petitioner replied (R. 10, 77):

I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart.

Petitioner then led the agents to a closet in his bedroom. Agent Costa removed a brown suitcase from the floor of the closet and opened it. The suitcase contained approximately a pound of heroin, a quantity of cocaine, and certain paraphernalia used to "cut" narcotics (R. 10, 77). The agents requested that petitioner and his family take possession of the valuables which included a box containing \$2,675.00 (R. 10). Agent O'Connor thereafter found \$6,000 in cash in a shoebox hidden in a closet in petitioner's bedroom (R. 10). Later that same day, petitioner admitted that these funds represented profits earned in the sale of narcotics. He further admitted having been in the narcotics business over a period of years

and tentatively identified his source of supply (R. 10).*

4. In his opinion denying the motion to suppress, Judge Rayfiel found: (1) that the arrest warrant was properly issued (R. 82-86); (2) that, in any event, the agents had probable cause for petitioner's arrest (R. 86-89); and (3) that the search and seizure incident to that arrest were reasonable (R. 89).

The court of appeals held that "the complaint upon which the warrant of arrest was based was deficient * * * and would not support the warrant of arrest which was issued under it" (R. 97). The court of appeals, however, agreed with the district court that probable cause justified petitioner's arrest (R. 98-103), and that the search and seizure which followed the arrest were reasonable (R. 105). The court specifically rejected the contention that the lapse of time from the initial existence of probable cause (September 1958) until the arrest (March 1959) affected the validity of the arrest. "[W]e do not believe," the court said, "that the delay eradicated from Costa's mind the knowledge that he had received by

*The foregoing facts concerning petitioner's arrest and the seizure of narcotics at his apartment are taken from the affidavit of the Assistant United States Attorney, submitted at the hearing on the motion to suppress (R. 8-20), and his oral presentation at that hearing (R. 75-77). An affidavit submitted to the motion judge by petitioner's counsel gave another version of the search (R. 34; see also R. 95-96, note 1): "About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

September, 1958, of [petitioner's] apparent violations of the narcotics laws" (R. 104). Judge Waterman, dissenting, concluded that the arrest warrant was invalid, that there was no probable cause to support the arrest of petitioner without a warrant, and that, in any event, the arrest could not be relied upon to support the search of petitioner's apartment (R. 105-114).

SUMMARY OF ARGUMENT

I

Until recently, it has been assumed that the question of the appealability of an order determining a motion to suppress turned on whether the motion was filed before or after an indictment was returned. We submit, however, that this standard is contrary to the general principles which condemn fragmentary appeals and allow appeal from a nonterminal order only when the matter at issue is, in a realistic and practical sense, independent from and collateral to the criminal case.

A. The appeal of a tentative or incomplete decision, particularly in a criminal case, has usually been considered inconsistent with the fair and orderly administration of justice. "Finality as a condition of review [has been] an historic characteristic of federal appellate procedure * * *. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick v. United States*, 309 U.S. 323, 324, 325-326.

Undoubtedly, the finality rule is not a rigid, unyielding formula. Important rights, largely separate and discrete from the main cause, and finally disposed of in a collateral proceeding (including certain orders relating to the suppression of evidence) may well warrant immediate review even though the main case has not finally terminated. See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541. But this determination is to be made in light of the long-standing rule that intermediate review is the unusual, the exceptional, result. See *Carroll v. United States*, 354 U.S. 394.

B. Employing these principles, this Court in *Cogen v. United States*, 278 U.S. 221, held that an order denying a motion to suppress made after indictment, but before trial, was interlocutory and not appealable. The determination as to the appealability of suppression orders, the Court said, depended ultimately on the "essential character" of the motion "and the circumstances under which it is made." The Court, however, went on to say that an order deciding a motion to suppress is separate and appealable where "the motion is filed before there is any indictment or information against the movant * * *" (*id.* at 225). We submit that this broad statement in *Cogen*, on an issue not directly before the Court, did not fully describe the law at that time, and is not consonant with the underlying rationale of the more recent decisions of this Court.

1. The Court in *Cogen* relied, in stating that the time of the indictment was determinative, on the decisions of this Court in *Perlman v. United States*, 247 U.S. 7, and *Burdeau v. McDowell*, 256 U.S. 465.

These rulings were again followed in *Go-Bart Co. v. United States*, 282 U.S. 344. The facts and holdings of these three cases do not support the sweeping rule that the mere fact that no indictment has been returned when the motion is filed automatically establishes the appealability of the resulting order.

a. All three cases involved situations in which it was claimed that the government had no right to get or retain custody of the property in issue. In none of them was the Court required to consider whether the situation would be different where the motion related to contraband to which the moving party could assert no proprietary or possessory claim. This is a critical factor, for when the defendant cannot get property back his only interest is the effect of the order on the use of evidence at a criminal trial. In such a case, just as with other rulings relative to the admissibility of evidence, appeal should await final judgment.

b. Moreover, to the extent that there was uncertainty in *Perlman* and *Go-Bart* as to whether a criminal action would ever be brought, the situation here is distinguishable. In this case an indictment has been returned and it is clear that there will be a criminal prosecution; if petitioner is ultimately convicted, the ruling on the motion to suppress can be reviewed.

c. *Perlman* suggests that the order on the motion to suppress was appealable because the evidence could be used against the movant before the grand jury. This rationale would mean that, once a motion to suppress was brought, the government should be restrained from using the evidence in any way until

its right to do so had been fully determined. The result would obviously be to put a premium on dilatory tactics and lengthen the already considerable time needed to try criminal cases. Moreover, such a rule is inconsistent with the holdings of this Court forbidding judicial review of the evidence considered by the grand jury, since the defendant is fully protected by the exclusion of such evidence at trial. *E.g., Lawn v. United States*, 355 U.S. 339. In any event, under this rationale, even if the motion to suppress is filed before indictment, the reason for allowing an appeal would end with indictment. Since the order of the district court here came after indictment, the order in this case would not be appealable.

2. Considerations which no longer obtain were present, at least implicitly, in the early cases which seemingly laid down the time of return of the indictment as the governing factor of appealability. First, there was the desire to uphold the legal propriety of the motion to suppress, which was in its infancy as a remedy at the time of *Perlman* and *Go-Bart*. This was in part achieved in many cases by recognizing the appealability of the order, regardless of whether it was an integral part of the criminal case. At present, this remedy is well recognized and codified by Rule 41, F.R. Crim. P. Second, there was the possibility that, unless the order was immediately subject to review, principles of *res judicata* would apply to preclude later review. But, as this Court has recently made clear, the *res judicata* effect of an order depends, like its appealability, on practical considerations, i.e., its relationship to and effect on a par-

ticular case. *United States v. Wallace, Co.*, 336 U.S. 793. Where a motion to suppress affects only the use of contraband at a criminal trial, its practical impact is simply that of a procedural step in the criminal case.

Moreover, we believe that this Court in *Carroll v. United States*, 354 U.S. 394, and *United States v. Wallace, supra*, rejected the mechanical return-of-the-indictment test of appealability. In both these decisions, this Court stressed those basic considerations emphasized in *Cogen*—that the “‘essential character and the circumstances under which it is made’ determine whether a motion is an independent proceeding or merely a step in the criminal case.”

3. Following the decisions in *Carroll* and *Wallace*, the Fourth and Fifth Circuits have indicated that the time of the return of the indictment is not the determining factor in deciding the appealability of an order or a motion to suppress, even if the motion is brought before indictment. We submit that the more flexible view taken by these decisions not only best accords with the policy against piecemeal appeal but retains the essence of the total-circumstance approach of *Cogen* and conforms to the more recently expressed views of this Court.

C. The circumstances of this case demonstrate that the motion to suppress was simply a procedural step in the main criminal case.

1. The motion to suppress asked only for the suppression, in any criminal proceeding, of the material seized. Thus, the sole purpose of the motion was to prevent the use of evidence in the criminal case, a

purpose which demonstrates that the motion was in no way independent of the criminal case. When the motion does not ask for the return of the property seized (or the movant indisputably has no right to return, such as of narcotics), we submit that, regardless of when a motion is filed, it is never a separate proceeding which may be separately appealed.

2. Even if orders determining motions which do not ask for the return of property are sometimes appealable, they should not be appealable when they are filed after the start of the criminal case. The motion here was made after petitioner's arrest, the filing of a criminal complaint, the waiver of preliminary hearing, and the binding over of the movant for grand jury action. In short, petitioner filed his motion at a time when the criminal proceeding was running its normal course. Moreover, the motion was heard and decided after the indictment was returned, and the motion judge considered the proceeding as an integral part of the criminal case, specifically ruling that the order of denial was without prejudice to its renewal at trial. Only by disregarding these factors and making the return of the indictment the sole standard of appealability is there any basis for holding this order appealable.

II

A. We do not challenge the ruling of the court of appeals that the warrant for petitioner's arrest was not supported by a sufficiently specific affidavit. It is well established, however, that if an arrest is based on an invalid warrant the arrest is still legal if based

on probable cause. *E.g. United States v. Rabinowitz*, 339 U.S. 56, 60. Here, as both courts below held, there was clearly probable cause for petitioner's arrest.

B. The Fourth Amendment does not require that an arrest be made immediately after the arresting officer obtains probable cause. Numerous relevant law-enforcement considerations, such as the investigation of possible confederates, play a significant role in the decision as to when "to close the trap." Delay does not, in and of itself, show an insidious or sinister police purpose. In this case, all the indications in the record support the conclusion that the delay was reasonably motivated by a desire to determine who were petitioner's associates in the narcotics traffic.

C. 1. The Fourth Amendment does not require that law enforcement officers, proceeding on probable cause, obtain an arrest warrant if they have the time to obtain one. The history surrounding the adoption of the Fourth Amendment shows that the power to arrest without a warrant—unlike the power to search without a search warrant—preceded the development of the warrant procedure, and it was never intended that this power be supplanted by the warrant procedure. The claim that a warrant of arrest must be obtained by a constable if there was time for him to obtain one was specifically raised and rejected in the English case of *Davis v. Russell*, 5 Bing. 354 (1829). This ruling was followed in early American

cases where the courts similarly held that an arrest warrant need not be obtained even though there was time to obtain one. The principle of these early cases has been reaffirmed by this Court in *Trupiano v. United States*, 334 U.S. 699, 704-705, 708; *United States v. Rabinowitz*, 339 U.S. 56, 60; and *Abel v. United States*, 362 U.S. 217. In *Jones v. United States*, 357 U.S. 493, the Court cast some doubt on this principle where entry was accomplished by *force*. Here, however, the entry was wholly peaceable.

2. The statute which authorizes narcotics agents to arrest on probable cause (26 U.S.C. 7607) imposes no limits on this power merely because there is time to get a warrant. The legislative history shows that the purpose of Congress was to confirm that narcotics agents have the common-law power of peace officers, which includes the power to arrest on probable cause without a warrant. While it is true that Congress was concerned that this legislation make plain that narcotics agents are authorized to act in emergencies, there is no support for the claim that Congress meant to limit the agents' right of arrest without a warrant only to this situation. The courts of appeals that have dealt with this statute have uniformly recognized this authority to arrest without a warrant, even if the arrest does not immediately follow the officer's knowledge of the facts giving rise to probable cause.

D. Even if we assume, *arguendo*, that arresting officers are generally required to get a valid arrest warrant if they have time to do so, the failure to get a

valid warrant in this case did not render the arrest illegal.

The substantive protection afforded by the Fourth Amendment against unlawful arrests is the same whether the arrest is made with or without a warrant. If probable cause is lacking where either method of arrest is used, the arrest is invalid. Thus, the purpose of a rule requiring officers to get an arrest warrant would not be to impose a higher qualitative standard on officers making arrests; instead, the essential purpose of such a rule would be to require officers to obtain the determination of *judicial* officers that they have probable cause, rather than to make the decision on their own.

If this would be the rationale of a rule requiring officers to get arrest warrants if they have time, we submit that, even under that rule, the arrest here was lawful. This Court has held that, if an arrest is made on the basis of a warrant and the warrant proves to be defective, the arrest is nevertheless legal when based on probable cause. The arresting officer in this case procured an arrest warrant from a Commissioner—precisely the act the rule would be intended to encourage. The officer could not be expected to review the Commissioner's decision and seek a new warrant. The fact that the warrant was technically defective because the supporting affidavit did not sufficiently spell out the probable cause is basically harmless since the arresting officer did, in fact, have probable cause. There can be no sufficient purpose in penalizing the government and ultimately the pub-

lic merely because an officer and the Commissioner have made a nonprejudicial error.

E. There is nothing in this case to indicate that the arrest was made in bad faith or as an excuse to search, or that it was otherwise invalid. The officers, even though not required to do so, obtained a warrant for petitioner's arrest. While the arrest warrant was invalid since, through inadvertance, an officer failed to submit all the information at his disposal to the issuing Commissioner, this error certainly does not indicate bad faith.

Nor is there evidence that petitioner was arrested as a subterfuge to search his home. The denial of the officers' application for a search warrant does not show that the arrest was a subterfuge to search. From what appears in the record, the warrant was denied because the officers made a mistake in relying on Rule 41(c), F.R. Crim. P., rather than 18 U.S.C. 1405(2), which would have justified the issuance of a nighttime warrant. Moreover, the Commissioner did not decide the issue whether the officers had probable cause to arrest at the time he denied the search warrant; and as we have seen, the officers did in fact have adequate information.

The place, method, and time of arrest were also completely reasonable. Petitioner's apartment was the most likely place for the agents to find him. They entered these premises in a wholly peaceable manner and, when petitioner appeared, immediately placed him under arrest. The arrest at 8:15 p.m. was a

reasonable evening hour. See, e.g., *Abel v. United States*, 362 U.S. 217, 234-236.

F. It has long been established that a reasonable search of premises under the control of a person arrested on probable cause without a warrant is valid under the Fourth Amendment. See *Agnello v. United States*, 269 U.S. 20, 30; *Carroll v. United States*, 267 U.S. 132, 158; cf. *Weeks v. United States*, 232 U.S. 383, 392. This Court has recently reaffirmed this doctrine. *Harris v. United States*, 331 U.S. 145, 151; *United States v. Rabinowitz*, 339 U.S. 56; *Abel v. United States*, 362 U.S. 217, 236.¹

The search and seizure in this case were reasonable, whether or not one accepts the government's version that petitioner readily consented to the search. The scope and duration of the search did not approach the duration or intensity of the searches upheld in *Harris* and *Agnello*, *supra*; there was neither the indiscriminate ransacking of a whole house as in *Kremen v. United States*, 353 U.S. 346, 349-359, nor the sweeping seizure of private papers as in *United States v. Lefkowitz*, 285 U.S. 452. The officers sought and seized only the instrumentalities and fruits of the crime for which petitioner was arrested—narcotics, the tools for its use, and the profit of its traffic.

¹ The differences in view expressed by various members of this Court in search and seizure cases has stemmed, not from the absence of an arrest warrant, but from divergent opinions as to the permissible scope of search and the legality of seizure (without a search warrant) incident to a lawful arrest, whether pursuant to an arrest warrant or on probable cause.

ARGUMENT

I

THE ORDER OF THE DISTRICT COURT DENYING PETITIONER'S
MOTION TO SUPPRESS WAS NOT APPEALABLE

It had generally been assumed, until recently, that the appealability of orders on motions to suppress was governed by whether the motion was brought before or after indictment. That was the test applied below. To the extent that an order on a motion to suppress is treated as final, the government could probably appeal from the granting of the motion, as well as the movant from its denial. See *Burdeau v. McDowell*, 256 U.S. 465. It might therefore be said to be in the interests of the prosecution to take a broad view of appealability. We believe, however, that the indictment test is not consonant with the general principles disfavoring fragmentary appeals, and that appeals from nonterminal orders should be allowed (unless Congress has otherwise provided) only when the matter at issue is, in a realistic, practical sense, independent of the main cause. The decisions of this Court which were deemed to make the return of the indictment the crucial factor seem to us to have been interpreted more broadly than their actual holdings or their particular facts require. Furthermore, the rationale of those decisions has been to a considerable extent weakened by subsequent rulings of this Court.

Above all, we believe that undue confusion and delay would result from permitting appeals from de-

nials of motions to suppress merely because they were brought before indictment—and that this would far outweigh any potential loss to the prosecution resulting from its inability to review decisions which it believes have erroneously granted motions to suppress. The impact of such a rule would be to encourage a race between the potential defendant and the government to file a paper first: the motion to suppress on the former's part, the indictment on the prosecution's part. More important, if the order on any motion made before indictment were appealable the result would be to increase the already considerable time necessary to try criminal cases. This delay would interfere seriously in the proper and expeditious administration of criminal justice. The longer the delay the more the memory of witnesses for the defense, as well as for the prosecution, is likely to be weakened; indeed, witnesses may no longer be available at all. For this and other like reasons, it is clearly of great importance that, when the alleged criminal has been arrested, the trial be conducted as soon as possible after the events on which it is based. We believe, therefore, that interlocutory appeals delaying the trial should not be encouraged; they should be allowed only where the matter is clearly separate from the criminal case.

Accordingly, we submit that the order of the district court denying petitioner's motion under Rule 41(e), F.R. Crim. P., to suppress evidence at his forthcoming trial was not a final appealable order. It was not

sufficiently removed from, or collateral to, the main stream of the criminal case to be considered other than an interlocutory segment of that proceeding. Though the indictment was not returned against petitioner until after he had filed his motion to suppress—the indictment was returned before the hearing and the order of denial—all of the other relevant circumstances surrounding the suppression proceeding support the conclusion that the motion was simply a procedural step in the defense of a criminal charge and therefore was not independently appealable.

In supporting this contention, we discuss, first, the general principles governing the determination of whether an order can be deemed sufficiently final to be appealable, and, second, the application of those principles to orders on motions to suppress, in the light of the decisions of this Court. We will then turn to the particular facts of this case which we think show that the order on the motion to suppress was merely a step in a criminal proceeding and therefore was not appealable until after final judgment.

A. FRAGMENTARY APPEALS ARE NOT FAVORED

The appeal of a tentative or incomplete decision, particularly in a criminal case, has been considered incompatible with the fair and orderly administration of justice. "Finality as a condition of review [has been] an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324; see also *Parr v. United States*, 351 U.S. 513, 518-519; *Heike v. United States*, 217 U.S. 423, 428-

429; *McLish v. Riff*, 141 U.S. 661, 665; cf. *Carroll v. United States*, 354 U.S. 394, 399, 403-404, 406, 414-415.

In the *Cobbledick* case, *supra*, this Court held that an order denying a motion to quash a subpoena *duces tecum* was not a final decision within the meaning of Section 128(a) of the Judicial Code, which was the predecessor of the provision involved in this case (28 U.S.C. 1291, *supra*, p. 2). Both statutes permit an appeal to the courts of appeals only from "final decisions" of the district courts. The Court in *Cobbledick* explained the rationale underlying the concept of finality in criminal cases as follows (309 U.S. at 325-326):

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1899 was there review as of right in criminal cases. An ac-

cused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.

The finality doctrine is not, however, a rigid theoretical formula of fixed content or easy application.* Important rights, largely separate and discrete from the main cause, and finally disposed of in a collateral proceeding (including certain orders relating to the suppression of evidence) may warrant immediate review even though the main case has not finally terminated. In *Cohen v. Beneficial Loan Corporation*, 337 U.S. 541, this Court held appealable an order of the district court refusing to apply a state statute requiring the plaintiff in a stockholder's derivative action to give security for the defendant's reasonable expenses in connection with the action (*id.* at 546):

* An early definition of finality often relied on is that a decree is final for the purposes of an appeal "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I.M. & S.R.R. Co. v. Southern Exp. Co.*, 108 U.S. 24, 28-29. But judicial definitions of finality have not been entirely consistent. See Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 540.

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Thus, the question turns largely on the nature of the specific order, judged in relation to the case as a whole. In a practical realistic sense orders must possess "sufficient independence from the main course of the prosecution to warrant treatment as plenary orders." *Carroll v. United States*, *supra*, 354 U.S. at 403.

At the same time, it is established that the determination whether an order is final and therefore appealable must be made in light of the general, long-standing rule that intermediate review is the unusual, the exceptional, not the favored result. As this Court recently pointed out in *Carroll v. United States*, *supra*, 354 U.S. at 403:

The instances [of intermediate appeal] in criminal cases are very few. The only decision of this Court applying to a criminal case the reasoning of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, held, that an order relating to the amount of bail to be exacted falls into this category. *Stack v. Boyle*, 342 U.S. 1.

Only when the independent nature and immediate importance of the order is clear, should there be a departure from the normal pattern which leaves review to the appeal from a final judgment on the merits.

B. WHETHER THE INDICTMENT IS RETURNED PRIOR TO THE FILING OF A MOTION TO SUPPRESS IS NOT THE STANDARD, IN ITSELF, AS TO THE APPEALABILITY OF AN ORDER DETERMINING THE MOTION

The general principles discussed above have long been recognized as applicable to orders on a motion to suppress. In *Cogen v. United States*, 278 U.S. 221, the Court held that an order denying a motion to suppress evidence filed after indictment, but before trial, was interlocutory and not appealable. The overall standard, the Court said, depended in the final analysis on the "essential character" of the motion "and the circumstances under which it is made." *Id.* at 225. In explaining its ruling, the Court delineated some of the criteria which it considered significant in deciding whether an order on a motion to suppress was or was not independently appealable. Among the factors which it mentioned as indicating that the proceeding would be separate and appealable were:

(1) where the independent and equitable nature of the summary proceeding is manifest (*Essgee Co. v. United States*, 262 U.S. 151);

(2) where the application is made by a stranger to the main litigation (*Ex parte Tiffany*, 252 U.S. 32; *Go-Bart Co. v. United States*, 282 U.S. 344);

(3) where the criminal proceeding is pending in another court (*Dier v. Banton*, 262 U.S. 147);

(4) where the motion is not filed until the criminal case is finally terminated (*Dickhart v. United States*, 16 F. 2d 345 (C.A. D.C.));

(5) where the particular statutory scheme under which the application is brought renders the proceeding plenary in nature (*Steele v. United States No. 1*, 267 U.S. 498).

In cases in which these criteria are applicable, the separate nature of the motion to suppress is almost self-evident. Therefore the application of these principles has not, with few exceptions, proved troublesome. Orders which fall within the categories listed above have almost invariably been held appealable.*

The particular problem which this case presents and the problem on which a conflict of circuits has developed stems from still another criterion mentioned in *Cogen*, i.e., that the order is separate and appealable "wherever the motion is filed before there is any indictment or information against the movant, like the motions in *Pertman v. United States*, 247 U.S. 7 and *Burdeau v. McDowell*, 256 U.S. 465 * * * " (278 U.S. at 225). We do not believe that this single-line description of the law on an issue not directly before the Court is conclusive in a case arising over thirty years later. We submit that this is particularly true since, as we will show, this was too broad a generalization in view of the state of the law at the time; recent decisions of this Court and of the courts of appeals have cast further doubt on its correctness.

1. *The time of indictment has never been, in itself, the test of the appealability of all motions to suppress.*

* However, in *United States v. Koenig*, 290 F. 2d 166, petition for a writ of certiorari pending, No. 93, this Term, the Fifth Circuit held that an order suppressing evidence in a district other than that of trial was not final and appealable.

The statement in the *Cogen* case that an order on a motion to suppress is appealable "wherever the motion is filed before there is any indictment or information against the movant" was expressly based on the Court's prior decisions in *Perlman v. United States*, 247 U.S. 7, and *Burdeau v. McDowell*, 256 U.S. 465. These rulings were again followed, after *Cogen*, in *Go-Bart Co. v. United States*, 282 U.S. 344. Analysis of the facts of those cases indicates that it is too broad an interpretation of their holdings to read them as ruling that the mere fact that no indictment has been returned automatically establishes appealability.¹⁰

a. The *Perlman*, *Burdeau*, and *Go-Bart* cases all involved situations where the claimants asserted an interest in property which was not contraband, and claimed either a right to immediate return of the property or substantially similar relief. In *Perlman*, the documents in issue had been produced in a civil suit which had been concluded with the condition that the exhibits should remain impounded in the custody of the clerk and the evidence should be perpetuated for use in future cases between the parties to the civil action and their privies (see 247 U.S. at 9). When the United States sought to have the exhibits released to a grand jury to consider whether *Perlman* had committed perjury, *Perlman*, who claimed ownership of the exhibits, sought to have such use barred as violating his privilege against self-incrimination. In holding that *Perlman* had standing to bring the motion,

¹⁰ In addition, as we will discuss below (pp. 37-43) considerations entered into the decisions which are no longer valid in view of later decisions of this Court.

this Court pointed out that the "Government was not one of those for whom the use of the exhibits was reserved," but that it was exercising governmental authority (*id.* at 12). In other words, although Perlman (undoubtedly in view of the impounding order) had relinquished a claim to have the property returned to him, the situation, as between Perlman and the government, was the same as it is in the more usual case where a defendant seeks return of property which it is claimed the government has no right to retain in its possession. If Perlman's contentions had been correct, the exhibits although not given back to Perlman would remain in court for use only by the parties to the equity suit and would not have been available to the prosecution for any purpose. Similarly, *Burdeau v. McDowell*, 256 U.S. 465, 470, involved a government appeal from the granting of a motion for return of "books, papers, memoranda, correspondence and other data" being held by the government for presentation to the grand jury. And *Go-Bart v. United States*, 282 U.S. 344, where the denial of a motion to suppress was held appealable, also involved private papers and memoranda.

Thus, the three early decisions of this Court, which were assumed to have laid down the broad rule that orders on motions to suppress brought before indictment are automatically appealable, involved situations in which it was claimed that the government had no right to get or retain custody of the property at issue. In all these cases the property involved was not contraband. In none of them was the Court re-

quired to consider whether the situation would be different where the motion related to contraband, to which the moving party could make no claim, and where the motion could therefore have no purpose other than the suppression of evidence in a criminal proceeding.

We think that whether the defendant does or does not have a right to claim return of property (or as in *Perlman* the equivalent) is a very significant factor on the question of appealability. To take a simple illustration, where a defendant claims the right to the return of \$10,000, he would sustain an immediate, practical deprivation of property rights if his right to the money must await indictment and, possibly, criminal trial and appeal.¹¹ The right to the use of the money is itself important. But where the defendant cannot get any property back, whether his motion to suppress is granted or denied, his only interest is the effect of the order on the use of the evidence at a criminal trial. In that situation, it seems to us—just as in the case of other rulings relative to evidence to be used at a trial—that appeal should await final judgment.¹²

¹¹ Even in that situation a motion brought *after* indictment is not normally appealable. Presumably, the rationale is that, if a defendant waits until after indictment, his main interest is not in return but in suppression. See *Cogen v. United States*, 278 U.S. 221. It should be noted, however, that this Court in *Cogen* recognized that, even after indictment, the proceeding might be sufficiently discrete to be appealable. *Id.* at 226. See also *United States v. Ponder*, 238 F. 2d 825 (C.A. 4).

¹² In two recent cases, we have articulated the government's view that there is an important distinction between a motion

b. It is true that in *Perlman*, in dealing specifically with the question of the finality of the order denying the motion to suppress rather than Perlman's standing, this Court did not rest on the nature of the property. Instead, the decision was seemingly based on the fact that, if not prevented, the evidence would be used against Perlman "in a proceeding not yet brought and depending upon it to be brought." The opinion stated that the Court could not agree that Perlman "was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way." 247 U.S. at 13. In that situation, there was as yet no criminal proceeding instituted against Perlman even in the form of a complaint. Similarly, the Court in *Go-Bart v. United States*, *supra*, 282 U.S. at 356, in holding

for the return of property brought before indictment and a motion involving contraband where the motion, although brought before indictment, is only to suppress the use of evidence. *United States v. Murphy*, 290 F. 2d 573 (C.A. 3), pending on petition for a writ of certiorari, No. 317, this Term (see the government's brief in opposition, p. 4, note 1); *Carlo v. United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944 (see the government's brief in opposition, No. 908, Oct. Term 1960, pp. 8-9). In those cases, we said that where the motion is for the return of objects in which the defendant has a substantial property interest (\$20,100 in *Carlo* and four hundred bags of sugar, a hand truck, dock ramp, tractor-trailer, and \$3,846 in *Murphy*) and is made before indictment, the order is appealable. On the other hand, if the objects seized have no substantial property value (for example, a document not needed for business or other purposes) and return is clearly sought to prevent use at trial, we think that the order is not appealable—at least if the motion is made after a complaint beginning the criminal case has been filed. For a more complete discussion, see *infra*, pp. 46-51.

appealable an order denying petitioner's application for return and suppression of personal books and papers, stated that "[w]hen the application was made, no information or indictment had been found or returned," and that "[t]here was nothing to show that any criminal proceeding would ever be instituted."¹³ To the extent that there was uncertainty in those cases as to whether a criminal action would or would not be brought, the situation is distinguishable from that here. In this case, an indictment has been returned and it is clear that there will be a criminal prosecution. Therefore, if petitioner is ultimately convicted the ruling on the motion to suppress can be reviewed.¹⁴

c. The *Pertman* decision suggests that the order denying the motion to suppress was appealable because the evidence could be used against the movant before

¹³ Although the motion in *Go-Bart* was filed after petitioner's arrest and arraignment, nothing had been done thereafter to expedite the criminal proceedings. The hearing in the district court had been postponed on several occasions, and at the time of this Court's decision—about a year and a half after arraignment—no further action had been taken (see 292 U.S. at 350).

¹⁴ The Fifth Circuit has made the same distinction between cases where it was clear a criminal proceeding would be brought and those where there was considerable doubt. In *Zacarias v. United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935, the court held that the complaint and preliminary hearing were the commencement of a criminal case and therefore motions to suppress made after that time but before indictment were not appealable (see *infra*, pp. 44-45). On the other hand, the Fifth Circuit has held that orders on motions to suppress brought before there had been a preliminary hearing on a specific charge were appealable. *White v. United States*, 194 F. 2d 215 (C.A. 5), certiorari denied, 343 U.S. 930; see also *Foley v. United States*, 64 F. 2d 1 (C.A. 5).

the grand jury. The holding was so interpreted in *Cobbledick v. United States*, 309 U.S. 323, 328-329:

Perlman's exhibits were already in the Court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality, a means of denying Perlman any appellate review of his constitutional right.

This idea has persisted in some later decisions. See *In re Fried*, 161 F. 2d 453, 458 (C.A. 2); *United States v. Sineiro*, 190 F. 2d 397 (C.A. 3); *Freeman v. United States*, 160 F. 2d 69, 70 (C.A. 9). If, as these cases indicate, the underlying rationale for holding that an order denying a motion to suppress is appealable is that a defendant has the right to keep the evidence from being considered by a grand jury, that rationale applies even where the motion is directed to contraband. On that theory, a defendant has the right to appeal an order which would allow the evidence to go before the grand jury and presumably the government has the right to appeal an order denying it that right.

This rationale has on the surface a neat logic which may be appealing, but in practical application we think it creates more problems than it solves. Its net result would be to open the door to long delays in criminal prosecutions which would far outweigh the

protection afforded defendants. Moreover, it is unsatisfactory and unfair to determine whether an order on a motion to suppress is appealable on the basis of whether the indictment was returned before the ruling on the motion or the appeal. Grand juries sit with greatly varying frequency in different parts of the country, and we do not think that the appealability of a order on a motion to suppress ought to depend on the happenstance whether the government can obtain an indictment before the court rules on the motion to suppress. Rather, if the mere possible return of an indictment on the basis of illegally obtained evidence were so great an injury that an order permitting evidence to go before a grand jury should be deemed independently appealable, logic would require that where the motion to suppress is denied, the government should not be permitted to use the evidence until its right had been finally determined. Such a ruling, however, would put an even greater premium on dilatory tactics and would almost inevitably result in unnecessary appeals from denials of motions to suppress and prolong the already lengthy period needed to try a criminal case.

This Court has recognized that defendants are not allowed to challenge the evidence which is considered by the grand jury. Thus, in *Costello v. United States*, 350 U.S. 359, the Court refused to allow a defendant to challenge his indictment on the ground that it was supported only by hearsay evidence. In *Lawn v. United States*, 355 U.S. 339, this holding was applied to a situation involving the alleged use by the

grand jury of evidence which was unconstitutionally obtained. The district court had held that the obtaining of certain records from the defendant violated his privilege against self-incrimination. The defendant claimed that this evidence had been used by the government in securing an indictment and asked for a full hearing on this allegation, which was refused. This Court affirmed, rejecting the idea that defendants can challenge indictments on the ground that illegally obtained evidence was presented to the grand jury. Quoting from *Costello*, the Court said (355 U.S. at 350):

"It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

An appeal concerning evidence which may in the future be used by a grand jury, like the hearing involved in *Lawn*, is an attempt to impose technical rules on the grand jury and would result in interminable delay. If evidence which was in fact illegally obtained is used at the trial, it can of course be challenged on appeal and the conviction can be reversed. It therefore seems to us that, where a motion to suppress can have for its purpose only the

prevention of the use of seized property as evidence, the appealability of the order should not depend on whether the evidence might be used by the grand jury; the issue should be determined at the trial, subject to appeal from final judgment.

In any event, if the rationale for allowing appeals from orders denying motions to suppress is that appeal is necessary to prevent use by the grand jury of illegally obtained evidence, the reason for allowing the appeal would end with the return of the indictment even if the motion to suppress is brought before indictment. In that case the rule should be that, even if a motion to suppress is brought before indictment, the order is not appealable if an indictment is returned before the ruling on the motion or pending appeal. If this rule were applied to the instant case, the order denying suppression was clearly not appealable since the indictment was returned before the order was issued.

2. *Even if the time of indictment was once the standard of appealability, it is not and should not be the standard today.*

a. *Considerations which formerly supported a broad view of the appealability of orders on motions to suppress are no longer pertinent.*—The early decisions of this Court which were assumed to lay down as the test of appealability the time of the return of the indictment seem to us to have at least implicitly involved considerations which are no longer pertinent. The motion to suppress on Fourth Amendment grounds was in its infancy as a legal remedy at the

time of *Perlman* and *Go-Bart*, and even later. "Independent petitions, either before or after criminal proceedings [were] started, summary motions or petitions in criminal cases after indictment or information, independent bills in equity [were] all recognized by the courts as proper." *Goodman v. Lane*, 48 F. 2d 32, 35 (C.A. 8), and cases there cited. In view of the novelty and uncertainty as to the appropriate pre-trial remedy, it is quite possible that immediate appellate review was held available in some of these cases, at least in part, to underscore and solidify the propriety of the basic procedures followed. Since the courts were not clear as to their own underlying jurisdiction over the suppression proceedings (cf. *Eastus v. Bradshaw*, 94 F. 2d 788 (C.A. 5); *United States v. Maresca*, 266 Fed. 713 (S.D. N.Y.)), it was a logical step, once such initial jurisdiction was exercised, to vindicate it by holding the resultant order appealable. See *Essgee Co. v. United States*, 262 U.S. 151, where, although the petition for return was filed in a criminal case, it was entitled a separate equitable proceeding and treated as such on appeal. Cf. *Dowling v. Collins*, 10 F. 2d 62 (C.A. 6).

At present, the right to move to suppress has been codified by Rule 41, F. R. Crim. P., adopted in 1946. Certainly, to the extent that no property rights are involved and the motion is merely to suppress the use of things or information as evidence, there is no reason now why the proceeding should not be treated as it is called, a "motion" in a criminal case. Under general principles of finality, a motion under Rule 6

challenging the composition of a grand jury is an interlocutory motion and an order denying the motion is not appealable until after final judgment. Cf. *Carroll v. United States*, 354 U.S. 394, 403; *Parr v. United States*, 351 U.S. 513, 518-519. There is no reason why a motion challenging the evidence which may go to a grand jury should not be in the same category with respect to appealability.

In view of the provisions of Rule 41(e) providing for a motion to suppress in the district of trial there is no longer any doubt that the order on such a hearing can be reviewed after final judgment in the criminal case, even if the motion were made before indictment. While, ordinarily, a trial judge will not without new evidence reverse a ruling by another judge of coordinate jurisdiction (see *United States v. Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873), it is "the trial court's normal province to pass on the admissibility of evidence." *United States v. Klapholz*, 230 F. 2d 494, 497 (C.A. 2), certiorari denied, 351 U.S. 924. Hence, if a defendant's motion to suppress before indictment is denied, he may object to the admissibility of the evidence at the trial and preserve that question for appeal after final judgment.

Closely intertwined with the novelty of the remedy and equitable cast of the relief sought, was the possibility prior to *Cogen* that, unless the order was subject to independent review, principles of *res judicata* might apply to preclude appellate consideration. Cf. *Steele v. United States No. 1*, 267 U.S.

498; *Steele v. United States* No. 2, 267 U.S. 505. This effect might result for two reasons. First, motions to suppress were being considered as separate equity proceedings. And second, although this Court had held that denial of a pretrial motion to suppress did not necessarily foreclose renewal of the application at trial (e.g., *Gould v. United States*, 255 U.S. 298, 303; *Agnello v. United States*, 269 U.S. 20, 34-35), this was a radical departure from the general judicial policy forbidding interruption at trial to "permit a collateral issue to be raised as to the source of competent evidence." *Segurola v. United States*, 275 U.S. 106, 111-112. Since there was no established procedure, such as there is now, which made it clear that the proceeding for suppression could be renewed as a "motion" in the criminal case even if originally brought before indictment, there was room for belief that the proceeding for suppression, if brought before indictment, was not so related to the criminal case as to be part for it. Hence, the order on the motion could be deemed to have final effect even if an indictment was brought before it was decided.¹⁵

b. *Recent decisions of this Court indicate that the time of indictment is not, in itself, the standard of appealability.*—Since the decisions in *Cogen* and *Go-Bart*, this Court has made clear, in *United States v. Wallace Co.*, 336 U.S. 793, that the *res judicata* effect, and by implication the appealability, of an

¹⁵ As we point out in our petition for a writ of certiorari in *United States v. Koenig*, No. 93, this Term, pp. 10-11, there is a similar problem where the order of suppression is brought in a district other than that of trial.

order on a motion to suppress, must be determined by the practical effect of the order. In *Wallace* the government's motion to require production for use in a civil anti-trust suit of documents which had been previously suppressed in a criminal proceeding, was denied by the trial court. In rejecting the claim that the suppression order in the criminal case was *res judicata*, this Court observed that such a conclusion depended on (336 U.S. at 802):

* * * whether the proceeding was handled by the court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial. For a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend far beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case. *Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances.* See *Cogen v. United States*, 278 U.S. 221. [Emphasis added.]

Since a motion to suppress which does not ask for return of the property necessarily affects only the use of the evidence at a criminal trial—particularly where the indictment is returned prior to the district court's decision on the motion—it is in practical effect part of the criminal trial and should be treated as such.

Moreover, and more fundamentally, we believe the ruling of the court below in relation to the particular situation presented by this case—i.e., a motion designed only to suppress evidence at an anticipated criminal trial—is contrary to the spirit of this Court's ruling in *Carroll v. United States*, 354 U.S. 394. It is true that in the *Carroll* case the Court recognized the earlier decisions which were deemed to make the time the indictment was returned the crucial determinative factor (*id.* at 403-404):

Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment* * * *.

But the problem before the Court in *Carroll* was the right of the government to appeal from denial of a motion brought *after* indictment. Therefore the Court had no occasion to consider the issue with which this case is concerned, i.e., whether a motion merely to suppress evidence, brought *after* preliminary hearing and before indictment, is part of the criminal case.

In basic philosophy, however, the *Carroll* case (as the *Wallace* case before it) seems to us to have outmoded any mechanical test of appealability which rests solely on the question of whether the motion is made before or after indictment. In holding that the government had no right to appeal from an order granting a motion to suppress filed after indictment, this Court pointed out in *Carroll* both that fragmentary appeals are not favored and that appeals by the government in criminal cases are not permitted ex-

cept in the specific instances where Congress has made provisions for such appeals." Moreover, the Court in *Carroll*, quoting from *Cogen v. United States*, 278 U.S. 221, 225, stated that the "'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case" (354 U.S. at 404, note 17). It follows, we believe, that where, as a practical matter, the ruling on a motion to suppress, even though brought before indictment, is in effect merely a ruling on evidence at a forthcoming criminal trial, the order is not appealable by either the defendant or the government.

c. *Recent decisions of the courts of appeals have refused to consider the time of indictment as the standard, in itself.*—Until recently, the courts of appeals followed the statement in *Cogen* indicating that the time of indictment alone determines the appealability of an order on a motion to suppress.¹⁷ All the courts

¹⁶ Congress has specifically provided for appeals by the government from grants of motions to suppress in narcotics cases. 18 U.S.C. 1404. This Court had suggested in *Carroll* that, if there is a need for government appeals, it is the function of Congress to decree a departure from "the historical pattern of restricted appellate jurisdiction in criminal cases." 354 U.S. at 407.

¹⁷ E.g., *Cheng Wai v. United States*, 125 F. 2d 915 (C.A. 2); *United States v. Poller*, 43 F. 2d 911 (C.A. 2); *In re Milburne*, 77 F. 2d 310, 311 (C.A. 2); *United States v. Edelson*, 83 F. 2d 404, 405 (C.A. 2); *Lagow v. United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858; *Lapides v. United States*, 215 F. 2d 253, 254 (C.A. 2); *In re Sana Laboratories*, 115 F. 1 717 (C.A. 3), certiorari denied, 312 U.S. 688; *Weldon v. United States*, 196 F. 2d 874, 875 (C.A. 9); *Freeman v. United States*, 160 F. 2d 69 (C.A. 9).

of appeals, however, have not held, as the statement in *Cogen* would seem to require, that an order is appealable if filed before the indictment even though the indictment is returned before the motion is decided or pending appeal. The Second Circuit in the decision below and in other decisions has held that, if the motion is brought before indictment, the order thereon is appealable, even though an indictment is returned before the order is entered or pending appeal. *In re Sana Laboratories*, 115 F. 2d 717 (C.A. 3), certiorari denied, 312 U.S. 688; *Hoffritz v. United States*, 240 F. 2d 109 (C.A. 9), *Freeman v. United States*, 160 F. 2d 69 (C.A. 9). On the other hand, other circuits have held that the order is not appealable if the indictment is filed prior to decision of the motion or of the appeal. *United States v. Williams*, 227 F. 2d 149 (C.A. 4); *Nelson v. United States*, 208 F. 2d 505 (C.A. D.C.); *United States v. Mattingly*, 285 Fed. 922 (C.A. D.C.).

Recently, after the decisions of this Court in *Carroll v. United States*, 354 U.S. 394, and *United States v. Wallace Co.*, 336 U.S. 793 (both of which are discussed, *supra*, pp. 40-43), the Fourth and Fifth Circuits have indicated that the time of the return of the indictment is not the critical factor in deciding the appealability of an order on the motion to suppress and that the motion, even if brought before indictment, may be so involved in a pending criminal proceeding as not to be independently appealable. The Fifth Circuit held that, where the motion is brought after complaint and preliminary hearing and

its purpose is merely to suppress the use of the evidence at the anticipated trial arising out of the complaint, the order on the motion is merely a step in the criminal proceeding then in progress. *Zacarias v. United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935; *Saba v. United States*, 282 F. 2d 255, pending on petition for a writ of certiorari, No. 34, this Term. As the court of appeals observed in *Zacarias* (261 F. 2d at 418):

[W]e think it quite plain that after a complaint has been issued by a United States commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross-examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute "[h]eld to answer in the district court," a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable.

Similarly, in *United States v. Williams*, 227 F. 2d 149, 151-152 (C.A. 4), in holding that an order determining that a motion made before indictment is not appealable, Judge Parker stated: "we do not think that the time of the finding of the indictment is the sole criterion for deciding whether the proceeding initiated by the motion is plenary or interlocutory. Criminal proceedings were commenced against defendant when he was bound over by the Commissioner and gave bond for his appearance at District Court to answer the charge against him * * *."

The more flexible view of *Zacarias* and *Williams* accords best with the well-established rule against fragmentary appeals, and avoids a rigid formula which precludes intermediate review where the significance and ancillary nature of a particular issue might warrant it. These cases recognize realistically that the pendency of a criminal case does not inevitably depend on whether an indictment has been returned, but upon a number of related considerations. They retain the essence of the general approach of the *Cogen* opinion and conform to the more recently expressed views of this Court.

C. THE CIRCUMSTANCES OF THIS CASE DEMONSTRATE THAT THE MOTION TO SUPPRESS WAS NOT AN INDEPENDENT ACTION BUT SIMPLY A PROCEDURAL STEP IN THE CRIMINAL CASE

As we have contended above, we believe that the decisions of this Court establish that the appealability of orders on motions to suppress depend on a number of circumstances. We do not suggest, however, that numerous factors should be weighed in each case; such a rule would mean that orders would be appealed in order to determine whether they were appealable. The result would be virtually as much delay in trying criminal cases as a rule making orders on motions to suppress freely appealable. Rather, we think that it is important that the courts lay down rules which are easily and clearly applied, at least in the large majority of cases, so that the parties can determine in advance, with reasonable accuracy, whether an order is appealable.

Looking to the "essential character" of the motion in this case and "the circumstances under which it [was] made" (*Cogen v. United States*, 278 U.S. 221, 225; see *United States v. Wallace Co.*, 336 U.S. 793, 803; *Carroll v. United States*, 354 U.S. 394, 404, note 17), we think the conclusion is inescapable that it was simply a procedural phase of the criminal prosecution.

1. Petitioner's motion to suppress asked not for the return but only for the suppression of the material seized incident to his arrest—i.e., "that the Government be estopped from using said items in any criminal proceeding * * * (R. 6). It did not even incidentally pray for the return of private property or of any items which might have been used by the government in proceedings apart from the prospective criminal trial. Cf. *Carlo v. United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *Centracchio v. Garrity*, 198 F. 2d 382, certiorari denied, 344 U.S. 866 (C.A. 1); *Lapides v. United States*, 215 F. 2d 253 (C.A. 2). The motion was simply aimed at suppressing the evidence seized—the bulk of which was contrabrand narcotics to which petitioner would not, in any event, be entitled." See *Cogen v. United States*, 278 U.S. 221, 227–228; *Thomas v. United States*, 128 F. 2d 617 (C.A. 6); *United States v. Rosenwasser*,

¹⁸ Although a large amount of money was also seized, and the motion made reference to miscellaneous papers and a passport, there is nothing in this record to indicate that petitioner was seeking anything but an order of suppression (see R. 3–6, 81, 90). As he admitted, these funds were the profits earned in narcotics traffic (R. 10). Compare our Brief in Opposition in *Carlo v. United States*, *supra*, No. 908, Oct. Term 1960, pp. 8–9.

145 F. 2d 1015 (C.A. 9). Thus, the "essential character" of the motion revealed that it was meant to be no more than a procedural weapon in the criminal case. It had no other function.

We submit that when the defendant does not claim the return of property or is indisputably not entitled to return (as in the case of contraband such as narcotics, unstamped liquor, and counterfeit money), the motion to suppress is automatically part of the criminal case whenever it is made. Even if—unlike this case—the motion is made, decided, and appealed before even a complaint is filed, we do not see how it can be considered an independent proceeding. For the defendant has no interest whatsoever in the return of the property. His sole purpose in making the motion is to suppress the use of the property in a criminal or forfeiture case, whether such a case is then pending or not. If no case is ever brought or a trial is never held, the denial of the motion to suppress is irrelevant. If a trial is held and the defendant is convicted, the denial of the motion to suppress is reviewable on appeal from the conviction. Thus, a motion to suppress which does not ask for return of the property (or which asks for the return of property to which the movant is clearly not entitled) can never give rise to an independent proceeding which is separately appealable:

2. Even if the Court decides not to apply the clear rule for which we contend—that orders denying motions which do not seek the return of returnable property are never separately appealable—we submit

that, at the least, such orders should not be appealable when they are made after the criminal case has commenced and particularly where they are not decided until after the indictment has been returned.

On March 9, 1959, petitioner was arrested on a federal narcotics charge, and the next day was arraigned on this charge before a United States Commissioner. At the commitment proceeding, petitioner waived preliminary hearing, was released on bail, and was bound over for grand jury action (R. 22-24; see Rule 5, F.R. Crim. P.). Petitioner did not make a motion under Rule 41(e) seeking suppression of the material seized incident to the arrest until June 17, 1959. Thus, a criminal charge had been instituted, and this proceeding was running its normal course at the time petitioner filed the motion. Cf. *Zacarias v. United States*, *supra*. The motion judge plainly considered this particular proceeding as an integral segment of the broader criminal proceeding. In his order denying the motion, he specifically pointed out that the order was "without prejudice * * * to a renewal thereof at the time of trial" (R. 90; see also R. 89).

In short, this is not a case in which the motion was filed in advance of any specific criminal charge having been brought (cf. *Lapides v. United States*, *supra*; *White v. United States*, *supra*), or where the separateness and independent nature of the motion was plain from the very outset (cf. *Essgee Co. v. United States*, 262 U.S. 151), or where a request for return of private property was made (cf. *Centracchio v. Garrity*, *supra*). On the contrary, in this case the

motion was filed only after a criminal charge had been lodged, and all steps in furtherance thereof short of indictment had been timely taken. And the motion was heard and decided after the indictment was filed. By specific direction of the motion judge, petitioner may renew his motion at the time of trial; and if it is then overruled and he is convicted, he may, in the normal order of things, raise the issue on appeal from the final judgment of conviction. Only by disregarding these factors and mechanically applying the return-of-the-indictment rule is there a basis for holding this order appealable. As a practical matter the admonition of *Cobbledick, supra*, 309 U.S. at 325-326, applies here in full measure:

An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection of a constitutional claim made by the accused in the process of a prosecution must await his conviction before its reconsideration by an appellate tribunal.

3. Since we urge that the time of indictment should not be taken as the critical standard for determining appealability, it is appropriate for us to discuss (and for the Court to consider) what rule should be applied in circumstances (unlike the present case) where the movant does request the return of returnable property. We believe, and have taken the position

previously in this Court, see *supra*, pp. 31-32, note 12), that a motion for return of property to which the defendant is clearly entitled if it was illegally seized, and where he has a substantial property interest in its return (such as the \$20,100² in *Carlo v. United States*, *supra*, 286 F. 2d 841), is normally appealable if the motion is brought before indictment. If, however, the defendant clearly does not have a substantial property interest in the seized materials (such as documents or copies of documents which he does not need), the motion is obviously directed toward suppression of the evidence at a criminal trial, despite the plea for its return. The order therefore should not be appealable, at least not if the motion is made after the complaint, and particularly if the order comes after the filing of the indictment. If the defendant has a substantial property interest in the seized materials in the event they are not contraband, and the issue whether the materials are or are not contraband is involved in the criminal case,¹⁹ the order should likewise probably be appealable only if made before complaint and determined before indictment. Where the criminal case has already been started by the filing of the complaint prior to the motion, this issue should be considered as part of the criminal case and therefore should not be separately appealable.

We believe that these or similar rules as to appeals from orders determining motions seeking the return of property can and should be applied in cases in-

¹⁹ For example, if there is a question whether currency is counterfeit.

volving those issues. Even though the rules we propose do not have a single standard as applied to all situations—such as the time of filing the indictment—they are sufficiently plain to provide a definite answer in a large proportion of the cases. In any event, regardless of what rule should be applied where the defendant seeks the return of property, the only issue now before the Court concerns motions which do *not* ask that relief. In this situation, the rule we propose is entirely clear and easily applied. Orders on such motions should not be separately appealable, no matter when the motions are filed, since they are obviously part of the criminal case.

II

THE SEARCH AND SEIZURE WERE VALID

On the merits, the issue is whether, as both courts below found, the arrest of petitioner, and the search and seizure incident to it, were valid. It is the government's position that the narcotics agents had probable cause for petitioner's arrest; that neither the five-month period between the acts giving rise to probable cause and the actual arrest (September 1958 to March 1959), nor any other factors surrounding the arrest made it unlawful; and that the scope of the search incident to arrest was reasonable.

A. EVEN THOUGH THE ARREST WARRANT WAS INVALID, PETITIONER'S ARREST MUST BE SUSTAINED SINCE THE ARRESTING OFFICERS HAD PROBABLE CAUSE

The district court held the petitioner's arrest supportable both on the arrest warrant and because the

arresting officers had probable cause (R. 81-89). The majority (R. 96-97) and dissent (R. 105) below, however, agreed that the warrant of arrest was invalid because the supporting affidavit on which it was based (R. 7) did not specify, except in general terms, the grounds of agent Costa's belief that petitioner was guilty of a narcotics offense²⁰ (see the Statement, *supra*, pp. 7, 9-10). As indicated in our Brief in Opposition (No. 574, Oct. Term 1960, p. 7), we do not challenge the ruling of the court of appeals that the warrant for petitioner's arrest was not supported by a sufficiently specific affidavit. But the technical invalidity of the arrest warrant certainly does not, as petitioner seemingly urges (Pet. Br. 27-29, 32-34), foreclose a finding that the arrest was lawful as based on probable cause. Congress has specifically empowered federal narcotics agents to arrest without a warrant on probable cause. 26 U.S.C. 7607(2), *supra*, pp. 2-3. And this Court has held that, even when law enforcement officers have made an arrest pursuant to a warrant later found to be technically defective, the arrest is nevertheless valid so long as the officers had probable cause. *Stallings v. Splain*, 253 U.S. 339, 342; *United States v. Rabinowitz*, 339 U.S. 56, 60; *Go-Bart Co. v. United States*, 282 U.S. 344, 356; cf. *Giordenello v. United States*, 357 U.S. 480, 488.

As both courts below held, the totality of the circumstances in this case demonstrated "probable cause,"

²⁰ It of course makes no difference as to the validity of the warrant that agent Costa in fact did have probable cause (see *infra*, pp. 53-54).

or in the statutory language "reasonable grounds,"²¹ to believe that petitioner had committed a violation of the federal narcotics laws. Both agents Costa and Moynihan had petitioner and Panzarella under close surveillance immediately preceding, during, and after the narcotics transactions of August 26 and September 10, 1958 (see the Statement, *supra*, pp. 4-6). On both these occasions, after Panzarella had agreed to sell heroin to agent Moynihan and had contacted his "connection," agent Costa witnessed Panzarella's meetings with petitioner, and, immediately following such meetings, Panzarella returned with heroin. Indeed, following the September 10th sale, Panzarella informed Moynihan that petitioner was his source of supply. In short, from the happenings of August 26 and September 10, agent Costa—in light of his own observations and the information imparted to him by his fellow agent—could reasonably conclude that petitioner was intimately involved in narcotics transactions. The agent consequently had probable cause for petitioner's arrest. See *Brinegar v. United States*, 338 U.S. 160, 175-176; *Draper v. United States*, 358 U.S. 307, 313; *Jones v. United States*, 362 U.S. 257, 269.

B. AN ARREST IS NOT INVALID MERELY BECAUSE IT IS NOT MADE AS SOON AS THE OFFICERS HAVE PROBABLE CAUSE

1. The narcotics officers were not required to arrest petitioner as soon as they had probable cause to be-

²¹ This Court has noted that probable cause and reasonable grounds "are substantial equivalents of the same meaning." *Draper v. United States*, 358 U.S. 307, 310, note 3.

lieve that he had violated the narcotics laws. The Fourth Amendment does not, by its terms or by implication, require that the powers of law enforcement officers be exercised at the first opportunity. *Scher v. United States*, 305 U.S. 251, 255; *United States v. Joiner*, 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880 (upholding the validity of an arrest pursuant to a warrant, even though executed some twenty-one days after the warrant was issued). While Rule 4(d) of the Federal Rules of Criminal Procedure specifically requires that a search warrant must be executed within ten days, the provisions regarding arrest warrants generally (Rule 4, F.R. Crim. P.) and arrests by narcotics officers on probable cause (26 U.S.C. 2607(2)) impose no such limitation.

As this Court has recognized, strategy is a necessary weapon "in the arsenal of the police officer" (*Sherman v. United States*, 356 U.S. 369, 372), and "[s]ome flexibility will be accorded law enforcement officers engaged in daily battle with criminals for whose restraint criminal laws are essential." *United States v. Rabinowitz*, *supra*, 339 U.S. at 65; cf. *On Lee v. United States*, 343 U.S. 747; *Olmstead v. United States*, 277 U.S. 438, 468. There are many considerations which justify delay of varying periods in the decision as to when "to close the trap." *United States v. Rabinowitz*, 339 U.S. 56, 65. For example, despite the existence of valid grounds for arrest, law enforcement agents may decide that an arrest at a particular moment is inopportune because it will jeopardize related phases of a broad investigation (*e.g.*, *O'Neal v. United*

States, 105 A. 2d 739, 740 (Mun. Ct. of App. D.C.), affirmed, 222 F. 2d 411 (C.A. D.C.)), or foreclose the discovery and identification of additional confederates and collaborators (e.g., *Carlo v. United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *Dailey v. United States*, 261 F. 2d 870 (C.A. 5), certiorari denied, 359 U.S. 969; cf. *United States v. Kancso*, 252 F. 2d 220, 222 (C.A. 2)), or endanger the bodily safety of officers or others (cf. *Leahy v. United States*, 272 F. 2d 487 (C.A. 9), writ of certiorari dismissed, 364 U.S. 945). It is not an unusual pattern in narcotics cases, in particular, for the agents to wait until there is a series of repeated illegal acts—any one of which may be sufficient to support an arrest—before making the arrest. See, e.g., *Gore v. United States*, 357 U.S. 386; *Blockberger v. United States*, 284 U.S. 299; *United States v. Volkell*, 251 F. 2d 333 (C.A. 2), certiorari denied, 356 U.S. 962; *Willis v. United States*, 271 F. 2d 477 (C.A. D.C.); *Johnson v. United States*, 270 F. 2d 721 (C.A. 9); *Dailey v. United States*, *supra*; *United States v. Kancso*, *supra*. The aim is to catch the major sellers and persons in charge, and delay is often useful for this purpose. In short, delay is a factor which is properly to be considered, together with all other pertinent criteria, in determining the reasonableness of the law enforcement activity. See *Carlo v. United States*, *supra*, 286 F. 2d at 846; cf. *Seymour v. United States*, 177 F. 2d 732 (C.A. D.C.).

But delay in and of itself does not show a sinister or insidious police motive either generally or in this

case. Here, as we have seen (pp. 53-54), agent Costa had probable cause to arrest in September 1958, after he had witnessed petitioner's meetings with Panzarella from which Panzarella returned with heroin and after Panzarella had informed another agent that petitioner was his source of heroin. There is no indication that agent Costa forgot this information in the ensuing five months before petitioner's arrest, particularly since the investigation of petitioner continued (R. 25, 28, 75-76). Thus, it seems clear that, despite the delay, agent Costa had probable cause to arrest petitioner at the time the arrest actually was made.

All the indications in the record are that the delay was simply the result of prudent, law enforcement motivated in good faith by a desire to discover the extent and scope of the narcotics enterprise in which petitioner was involved. Cf. *Abel v. United States*, 362 U.S. 217, 226-228. As the Assistant United States Attorney explained at the hearing on the motion to suppress (and no evidence was submitted to the contrary), the lapse of time was dictated by the desire "to find out who else was associated with * * * Di Bella in the narcotics traffic * * * " (R. 75-76). The agents were engaged in an investigation into "the possible sale and possession of narcotics in the area of Jackson Heights, Queens" (R. 25, 28). That the five-month investigation apparently failed in this purpose is no basis for holding that it tainted the arrest with invalidity. Just as it is the rule that what a search turns up cannot be used to justify an illegal arrest

(*United States v. Di Re*, 332 U.S. 581, 595), so the fact that an investigation proves unsuccessful does not show that the investigation was unreasonable. It would be strange if because their investigation quickly and successfully revealed that petitioner was in narcotics traffic, the agents were either required to reveal their identity to him by an immediate arrest, and thereby defeat the possibility that he could lead them to others involved in the illegal enterprise, or else lose the right to arrest him at all.

C. FEDERAL OFFICERS, WHO HAVE PROBABLE CAUSE TO MAKE AN ARREST, ARE NOT REQUIRED BY THE FOURTH AMENDMENT OR ANY STATUTE TO GET AN ARREST WARRANT EVEN THOUGH THEY HAVE TIME TO DO SO

1. The Fourth Amendment does not require, either in terms or by implication, that, where arresting officers have the right to act on probable cause without a warrant, a warrant must be obtained if there is time to obtain one. At the time of the adoption of the Constitution and ever since, except where the rule has been modified by statute, it has been settled doctrine that an officer of the law, whether in a private dwelling or elsewhere, may arrest on probable cause to believe that a felony has been committed and that the person arrested has committed it. See, *e.g.*, 4 Blackstone, *Commentaries* (Lewis ed. 1900), pp. 292-293; 2 Hawkins, *Pleas of the Crown*, pp. 128-137, 4 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957), pp. 224-247; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 673, particularly at 548-

550 and 685-689; *Carroll v. United States*, 267 U.S. 132, 156-157; *Kurtz v. Moffitt*, 115 U.S. 487, 504; *Commonwealth v. Phelps*, 209 Mass. 396, 410 (1911); *Rohan v. Sawin*, 5 Cush. (Mass.) 281, 284-285 (1850); *Wakely v. Hart*, 6 Binn. (Pa.) 316, 318-319 (1814); *Samuel v. Payne*, 1 Doug. K.B. 359 (1780); *Beckwith v. Philby*, 6 B. & C. 635 (1827).

As Professor Wilgus makes clear in his article cited above, the power to arrest without a warrant—unlike the power to search without a warrant—preceded the development of the warrant procedure and it was never intended by the framers of the Bill of Rights that the power to arrest without a warrant be supplanted by the warrant procedure. See also, e.g., *Rohan v. Sawin*, *supra*; *Wakely v. Hart*, *supra*; *Commonwealth v. Phelps*, *supra*; *Burroughs v. Eastman*, 101 Mich. 419, 423 (1894); *Clark v. Hampton*, 163 Ky. 692, 701 (1915). Indeed, the requirement in the Fourth Amendment that warrants be based on probable cause reflects the fact that, in the period immediately preceding the American Revolution, the invasion of personal liberty resulted, not from the conduct of law enforcement officers acting without arrest warrants, but from the abusive use of warrants. Thus, the evil involved in *Entick v. Carrington*, 19 How. St. Tr. 1029, arose from a warrant that empowered the executive officers to do that which they could not do without a warrant—i.e., arrest on suspicion without probable cause. Similarly, the writs of assistance were search warrants. Because of these abuses, the Fourth Amendment provided that no warrants should

issue except on probable cause; insofar as it applied to arrest, rather than search warrants, it was designed to make certain that warrants should not be used to authorize arrests which could not be made without a warrant.

The specific issue whether a warrant of arrest must be obtained by a constable when there is time for him to obtain one was raised in the English case of *Davis v. Russell*, 5 Bing. 354 (1829). In that case (an action in trespass for assault and false imprisonment) the plaintiff was arrested at her home in late evening on a charge of robbery committed some two months before. The Court of Common Pleas held that a warrant of arrest was not necessary. Chief Justice Best stated (*id.* at 363):

It has been further contended, that without a warrant from a magistrate a constable has no right to apprehend upon suspicion, unless there be danger of escape if he forbear to apprehend. The law, however, is not so.

Subsequently, he said (*id.* at 365):

We cannot uphold the notion that a constable is not permitted to go into a house at night to apprehend a person suspected.

Justice Gaselee stated (*id.* at 368):

As to the point about the probability of escape, none of the authorities cited go the length of saying that the constable cannot detain, except where he has reason to apprehend an escape.

The decision in *Davis*, announced within forty years after the adoption of the Fourth Amendment, reflects the state of the common law at the time that

Amendment was adopted." See also *Samuel v. Payne*, *supra*, where the arrest without a warrant also took place in a private dwelling. The same issue was raised in several early American cases and it was similarly held that a warrant of arrest need not be obtained even though there was time to get one. *Rohan v. Sawin*, *supra*, 5 Cush. (Mass.) at 286 (1850); *Holley v. Mix*, 3 Wend. (N.Y.) 350, 353 (1829); *Wade v. Chaffee*, 8 R.I. 224, 225 (1865).

This principle has been recently reaffirmed by this Court. In *Trupiano v. United States*, 334 U.S. 699, 704-705, 708, overruled on other grounds, *United States v. Robinowitz*, 339 U.S. 56, 66, federal agents arrested the defendant without a warrant in a farmhouse which they had entered, with the consent of the owner, on the ground that he was committing a felony in their presence. The Court held that "[t]he absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances." *Id.* at 705. This holding, however, was based on the fact that a felony was being committed in the officers' presence: "Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. These dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully pres-

²² The law in England today also permits arrest without a warrant on common law principles or where specifically authorized by statute. See 10 Halsbury, *Laws of England* (3rd ed. 1955), pp. 342-350.

ent." *Ibid.* There is likewise no danger "of unlimited and unreasonable arrests" where the officers clearly have probable cause to believe that a felony has been committed.

In *United States v. Rabinowitz*, 339 U.S. 56, the defendant was arrested in a one-room office by officers who had an arrest warrant—and therefore obviously had time to obtain one. The Court, after upholding the arrest on the basis of the warrant, stated that "[e]ven if the warrant of arrest were not sufficient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause to believe that a felony was being committed in their very presence." *Id.* at 60. And recently in *Abel v. United States*, 362 U.S. 217, 236, the Court stated:

Since a deportation arrest warrant is not a judicial warrant, a search incidental to a deportation arrest is without the authority of a judge or commissioner. But so is a search incidental to a criminal arrest made upon probable cause without a warrant, and under *Rabinowitz*, 339 U.S., at 60, such a search does not require a judicial warrant for its validity.

Petitioner relies on *Jones v. United States*, 357 U.S. 493. There a search was made without a warrant and not incident to an arrest. The government argued (for the first time in this Court) that the search was valid because the government agents entered the house lawfully in order to arrest the defendant on probable cause and once in the house could seize contraband in plain sight. *Id.* at 499. This

Court rejected this contention on the ground that the record showed that the officers had entered in order to conduct a search, not to arrest the defendant. *Id.* at 500. But the court did state that, if the government's contentions had been properly presented, they "would confront us with a grave constitutional question, namely, whether the *forceful* nighttime entry into a dwelling to arrest a person reasonably believed within upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment" (emphasis added). *Id.* at 499-500. This issue, however, is likewise not presented in this case for the record is clear that the officers did not enter petitioner's house by force. They announced their presence as officers and were admitted (see *supra*, p. 8). There was simply a peaceable entry followed by an arrest on probable cause—a procedure which, as we have shown, is consonant with Fourth Amendment guarantees.

In short, whatever one's individual judgment as to the desirability or undesirability of allowing law enforcement officers to make arrests without warrants when there is time to get a warrant, it is clear that a right which has been recognized as constitutional at the time of and since the adoption of the Fourth Amendment cannot now be deemed in violation of that Amendment. If changes are to be made, it should be for Congress and not the courts to make them.

2. The statute, which authorizes narcotics agents to arrest on probable cause—26 U.S.C. 7607, *supra*,

pp. 2-3—does not make such a change; it simply confirms that narcotics agents are authorized to perform all enforcement functions necessary to apprehend the narcotics violator and seize the narcotics in his possession. Thus, the statute itself, unlike Rule 41(d) with regard to search warrants, imposes no time limit on the power it confers on narcotics agents to arrest without a warrant.

Moreover, the legislative history of 26 U.S.C. 7607 confirms that Congress did not intend such a limitation. Prior to the adoption of this legislation, the issue was raised in several cases as to whether narcotics agents had the power of law-enforcement officers of the United States, or simply the more restrictive rights of arrest belonging to private persons. See *United States v. Jones*, 204 F. 2d 745, 752-754 (C.A. 7), certiorari denied, 346 U.S. 854. It was the prime aim of 26 U.S.C. 7607 to make clear that narcotics agents did have the authority of peace officers of the United States. As Senator Daniel, the sponsor of the bill in the Senate, put it: "The purpose is to give these law-enforcement officers status comparable to that now held by agents of the Federal Bureau of Investigation and other Federal enforcement officers." 102 Cong. Rec. 7284. See also S. Rept. No. 1997, 84th Cong., 2d Sess., p. 11; H. Rept. No. 2388, 84th Cong., 2d Sess., pp. 10, 70; H. Rept. No. 2546, 84th Cong., 2d Sess., p. 14 (Conference Report). Undeniably, as petitioner points out (Pet. Br. 35-36), Congress was concerned that narcotics agents have the authority to act with dispatch to prevent the destruction or removal of readily

disposable narcotics evidence. But the desire of Congress that the enforcement agents be empowered to act quickly and immediately under the necessities of the moment is certainly no basis for concluding that Congress meant to empower these agents to arrest without a warrant *only* in an emergency situation—that they were to have more limited arrest power than other federal enforcement agents.

Accordingly, the courts have uniformly held that the statute gives narcotics agents the same power to arrest as peace officers generally and does not require, in order for narcotics agents to arrest without a warrant, “that an arrest be made immediately following the arresting officer’s knowledge of probable cause for arrest.” *Dailey v. United States*, 261 F. 2d 870, 872 (C.A. 5), certiorari denied, 359 U.S. 969; see *Alvarez v. United States*, 275 F. 2d 299, 302 (C.A. 5) (“The statute [26 U.S.C. 7607] does not impose limits of time and the courts will not interpolate such limits”); *United States v. Davis*, 281 F. 2d 93, 97 (C.A. 7), reversed on other grounds, 364 U.S. 505; *Carlo v. United States*, 286 F. 2d 841, 846 (C.A. 2), certiorari denied, 366 U.S. 944 (three-month delay).

D. EVEN IF ARRESTING OFFICERS ARE GENERALLY REQUIRED TO GET A VALID WARRANT IF THEY HAVE TIME, THEIR FAILURE TO DO SO IN THIS CASE DID NOT RENDER THE ARREST INVALID

We have contended above (pp. 58–63) that the Fourth Amendment does not forbid officers to arrest on probable cause merely because they had time to get an arrest warrant. We have shown, we believe, that this

was the assumption of the framers of the Constitution and American and English courts since that time. In this section we assume *arguendo*, however, that the Court may decide to pass over the teachings of history and require arresting officers to get a warrant if they can do so. Nevertheless, we submit that petitioner's arrest was valid.

As we interpret the Fourth Amendment and its history, an officer can make an arrest without a warrant if he has probable cause to believe that a felony has been committed (as well as if a felony or misdemeanor is being committed in his presence). A court, as the Fourth Amendment expressly states, can likewise issue an arrest warrant only on the basis of probable cause. If probable cause is lacking when either method of arrest is used, the arrest is invalid and any search and seizure made incident to it is illegal. Thus, no greater *substantive* protection is afforded by a rule requiring arresting officers to get a warrant if possible; the test would still be probable cause. To put the problem into the context of this case, agent Costa was entitled to get an arrest warrant, on the basis of probable cause, by going through the necessary formalities.

Thus, it can readily be seen that the purpose of a rule requiring officers to get an arrest warrant would not be to impose a higher standard on officers making arrests. On the contrary, the purpose of the rule would be to require officers to seek the decision of judicial officials that they have probable cause, rather than making the decision on their own. Presumably,

the decision of the judicial officials will be more accurate and therefore fewer illegal arrests will result. Cf. *Trupiano v. United States*, 334 U.S. 699, 705; *United States v. Lefkowitz*, 285 U.S. 452, 464; *Jones v. United States*, 362 U.S. 257, 270-271; *United States v. Walker*, 246 F. 2d, 519, 527-528 (C.A. 7).

If, as we believe clear, the purpose of a rule requiring officers to get warrants if they have time to do so would be to require a decision by a judicial officer, we submit that the arrest here was legal. The arresting officer went to a Commissioner and received an arrest warrant. This is precisely the act which the rule would be intended to encourage. As it happened, the warrant was defective because the supporting affidavits were not specific enough to disclose the probable cause which the arresting officer in fact had (see *supra*, pp. 7, 53-54). This Court, however, has held that, if an arrest is made on the basis of a warrant and the warrant is defective, the arrest is legal when based on probable cause (see the cases cited *supra*, p. 53). Thus, the arrest is legal unless the rule (which we have assumed *arguendo*) that officers must get an arrest warrant if they have time overrules these cases—that is, that this rule means that the officers must get a valid warrant and if the warrant ultimately is decided to be invalid, an arrest made even on probable cause is illegal.

We submit that, even if the rule requiring use of arrest warrants is adopted by the Court, no purpose is served by extending the rule to cover cases such as this one when the officers have in good faith gotten

a warrant (see *infra*, pp. 68-72). Obviously, it cannot encourage greater use of the warrant procedure. Officers cannot be expected to review a Commissioner's decision to issue a warrant and then to seek a new warrant if they decide the first warrant was defective. Nor would a rule covering the situation involved in this case substantially encourage officers to be more careful in proving probable cause before the Commissioner. While some officers are undoubtedly tempted to determine probable cause for themselves rather than to take the time and trouble to get a warrant, when they do attempt to get a warrant little additional time or trouble is needed to submit an affidavit which does provide enough facts to show probable cause instead of one which does not."

A mistake in the amount of specificity in the affidavit is essentially technical and harmless as long as the officer in fact had probable cause but merely failed to describe his information adequately. There can be no purpose in penalizing the government and ultimately the public for such a technical mistake made in good faith by the Commissioner who issues the defective warrant, and the enforcement officer, when the mistake is basically harmless.

In short, even if arresting officers are required to get a warrant if they have time, this rule should not be applied to the situation where the officers have gotten a warrant although it is defective. Instead, we submit, the rule already enunciated by this Court

"We assume, of course, that the officer has probable cause. If he does not, the arrest will be invalid under any rule.

should be reaffirmed—that if officers make an arrest on the basis of a warrant which is determined to be defective, the arrest is valid if based on probable cause.

E. THE TOTALITY OF CIRCUMSTANCES IN THIS CASE DOES NOT SUGGEST THAT THE ARREST WAS MADE IN BAD FAITH AS AN EXCUSE TO SEARCH OR WAS OTHERWISE INVALID

Petitioner argues that the totality of the circumstances in this case shows that the arrest was made in bad faith as an excuse to search and was unreasonable. This contention is without merit.

1. About a month after the September 10 transaction, on October 15, 1958, agent Costa applied for and obtained a warrant for petitioner's arrest, even though there was no constitutional or statutory requirement (see *supra*, pp. 58-65). The fact that the arrest warrant was invalid because of a technically defective complaint does not indicate that the agent had no basis for the arrest; rather it indicates only that agent Costa, through inadvertence, failed to submit all of his information to the issuing Commissioner. As we have shown (pp. 53-54) and both courts below have held, the arresting officer clearly had probable cause.² In terms of the underlying purpose and intent of the agents, the application for an arrest warrant reveals that they were acting in good faith when they decided to arrest petitioner.

² Petitioner's reliance (Pe . Br. 23, 25-26, 41) on decisions that hold searches unlawful which were made after arrests found not to be based on probable cause is therefore misplaced. *Johnson v. United States*, 333 U.S. 10; *McDonald v. United States*, 335 U.S. 451.

2. Petitioner claims (Pet. Br. 25-26, 42-44) that the five-month hiatus between the facts giving rise to probable cause and the arrest shows an improper motive. We have seen, however (pp. 55-57), that the record does not even suggest that the delay was dictated by other than relevant and reasonable law enforcement considerations. Such considerations are directly relevant on the issue whether the officers are acting in good faith. See *Abel v. United States, supra*, 362 U.S. at 226-228.

3. There is no evidence that petitioner was arrested as a subterfuge to search his home. The place where petitioner lived was of course the most likely place to find him. No doubt the agents did contemplate a search of the premises for narcotics as an incident to petitioner's arrest, if he were arrested at home. Since the agents had good reason to believe that petitioner was dealing in narcotics, they unquestionably would have searched him and the premises where he was found wherever he was arrested. Indeed, such an ancillary purpose is undoubtedly present in almost every situation where the alleged criminal is arrested in his home, place of business, or automobile, and the courts have never invalidated a search and seizure on this ground. Indeed, they have specifically held that the fact that the agents had as an ancillary purpose the intent to search the premises does not taint the arrest and the incidental search with illegality if the arrest was otherwise lawful. See *Williams v. United States*, 273 F. 2d 781, 794 (C.A. 9), certiorari denied, 362 U.S. 951; *Donahue v. United States*, 56 F. 2d 94, 97 (C.A. 9).

The fact that an application for a nighttime search warrant had previously been denied on October 6 does not, as petitioner suggests (Pet. Br. 26, 28), show that the arrest was a subterfuge to search. The record does not support petitioner's assumption that the agents were denied a search warrant by the Commissioner because they failed to establish probable cause for a search of the premises. On the contrary, from what appears in the record (see the Statement, *supra*, p. 6, note 4), the Commissioner denied their application under the assumption that, in order to obtain a warrant to search at night, the officers had to establish *positively* that the contraband they wanted to seize was on petitioner's premises, as required by Rule 41(c), F.R. Crim. P. (R. 73).²³ The agents were using the general form under Rule 41(c), even though, as to narcotics, 18 U.S.C. 1405(1) provides that "a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist * * *." Thus, it may well have been that the inclusion of the restrictive phrase "night-time search warrant" in the agents' affidavits (R. 27, 31), and their failure to refer to 18 U.S.C. 1405(1), led to the denial of the application.

In any event, whether the failure of the agents to draw 18 U.S.C. 1405(1) to the attention of Commissioner Abruzzo led to his denial of the application for a search warrant, or whether, as petitioner urges,

²³ The affidavits for the search warrant rested only on probable cause (R. 25, 28).

the Commissioner found no probable cause for its issuance, the denial of the application for the search warrant does not affect the validity of the arrest, and the search incident to it. Issuance of a search warrant depends on evidence that the *premises* to be searched contain stolen, embezzled, or contraband property. See Rule 41(a), F.R. Crim. P. On the other hand, probable cause for arrest depends solely on the question whether "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper v. United States*, 358 U.S. 307, 313; see also Rule 4(a), F.R. Crim. P. Thus, Commissioner Abruzzo made no ruling on the distinct issue whether probable cause existed for an arrest since no such ruling was called for. But even if he had made such a ruling, it would have been erroneous; agent Costa had probable cause (see *supra*, pp. 53-54) and, therefore, the arrest and search incident to it were valid.

4. The place, method, and time of arrest were also completely reasonable. As we have noted, petitioner's residence was the most obvious place for the agents to find him. The agents went to the door of petitioner's apartment only after they had observed that he was there (R. 9, 76). The agents rang the doorbell, and, when the door was opened by petitioner's step-daughter, they immediately identified themselves and showed her their credentials. She ushered them into the apartment and they asked to see petitioner.

When he appeared, he was immediately placed under arrest. Thus, access to petitioner's apartment was gained peaceably, after the agents had announced their authority.²⁶ And there was, as we will show below (pp. 79-81), no general search for evidence but a reasonable search for contraband narcotics in which the agents had good reason to believe that petitioner was dealing.

Petitioner's argument gains no strength from the fact that the arrest occurred in his apartment at approximately 8:15 p.m. in the evening. This was a reasonable hour. Moreover, this Court has never held that the validity of a search, incident to a lawful arrest, is determined by the time or place that it is made. It has refused to hold a search incident to a lawful arrest unreasonable simply because it is made in private premises during a particular time.²⁷ See, e.g., *Abel v. United States*, 362 U.S. 217, 222, 234-236 (arrest at about 7:00 a.m. in petitioner's hotel room which was his permanent residence); *Harris v. United States*, 331 U.S. 145, 151 (arrest and search of a home); *Agnello v. United States*, 269 U.S. 20, 30 (arrest and search of a home); cf. *United States v. Rabinowitz*,

²⁶ There is thus no problem of forcible entry as was involved in *Miller v. United States*, 357 U.S. 301, and suggested as presenting a problem in *Jones v. United States*, 357 U.S. 493, 499-500 (see *supra*, pp. 62-63).

²⁷ While it is true that Rule 41(c), F.R. Crim. P., provides more stringent requirements for the issuance of a nighttime as opposed to a daytime search warrant, no similar difference exists under Rule 4 which provides for arrest warrants, or under the statute (26 U.S.C. 7607(2)) which authorized the officers here to arrest on probable cause.

339 U.S. 56." Therefore, while it may be true that stricter requirements of reasonableness are applied where a private dwelling is searched (*Davis v. United States*, 328 U.S. 582, 592), "[i]t is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises is subjected to search." *Harris v. United States*, 331 U.S. 145, 151.

F. THE SEARCH AND SEIZURE INCIDENT TO PETITIONER'S ARREST WERE VALID AND REASONABLE

1. It is established that a reasonable search of the premises under the control of a person arrested on probable cause *without a warrant* is valid under the Fourth Amendment. See *Weeks v. United States*, 232 U.S. 383, 392; *Agnello v. United States*, 269 U.S. 20, 30; *Carroll v. United States*, 267 U.S. 132, 158; *Harris v. United States*, 331 U.S. 145; *United States v. Rabinowitz*, 339 U.S. 56; *Abel v. United States*, 362 U.S. 217. Thus, in *Weeks v. United States*,

" Searches incident to lawful arrests in private dwellings have also been upheld in the courts of appeals. See, e.g., *United States v. Garnes*, 258 F. 2d 530 (C.A. 2), certiorari denied, 359 U.S. 937 (arrest in apartment after midnight); *Hopper v. United States*, 267 F. 2d 904 (C.A. 9) (arrest in apartment at about 10 p.m.); *United States v. Volkell*, 251 F. 2d 333 (C.A. 2), certiorari denied, 356 U.S. 962; *Smith v. United States*, 254 F. 2d 751 (C.A. D.C.), certiorari denied, 357 U.S. 937; *Jennings v. United States*, 247 F. 2d 784 (C.A. D.C.); *Johnson v. United States*, 270 F. 2d 721 (C.A. 9); *United States v. Burgos*, 269 F. 2d 763 (C.A. 2), certiorari denied, 362 U.S. 942; *Morton v. United States*, 147 F. 2d 28 (C.A. D.C.), certiorari denied, 324 U.S. 875; *Shew v. United States*, 155 F. 2d 628 (C.A. 4), certiorari denied, 328 U.S. 870.

supra, the Court recognized the right to search for instrumentalities of crime incident to arrest as a separate well-established category, independent of the right to search the person. The Court said that the case before it was not "the case of burglar's tools or other proof of guilt found upon his arrest within the control of the accused." 232 U.S. at 392. In *Agnello v. United States*, *supra*, where contraband narcotics were seized in the home of one Alba following an arrest based on probable cause, this Court said (269 U.S. at 30):

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. * * * The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures natural and usually appertain to and attend such arrests.

And in *Carroll v. United States*, *supra*, it was held that a search warrant was not necessary to justify the search of a moving vehicle if the searching officer had probable cause to believe that the contents of the automobile were offending the law. In the course of that opinion, this Court observed (267 U.S. at 158):

When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have

and which may be used to prove the offense may be seized and held as evidence in the prosecution.

The doctrine of *Agnello*, *Carroll*, and *Weeks* was recently given renewed vitality in *Harris v. United States*, 331 U.S. 145, *United States v. Rabinowitz*, 339 U.S. 56, and *Abel v. United States*, 362 U.S. 217. In *Harris*, a search of a four-room apartment incident to a lawful arrest there, was upheld as reasonable. The Court said (331 U.S. at 151):

The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises, under his immediate control."

In *Rabinowitz*, which involved a search of a one-room business place, incident to a lawful arrest, the Court stated (339 U.S. at 60):

Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest. Here the officers had a warrant for respondent's arrest which was, as far as can be ascertained, broad enough to cover the crime of possession charged in the second count, and consequently respondent was properly arrested. *Even if the warrant of arrest were not sufficient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause to believe that a*

" Although the arrest in *Harris* was under a warrant there is nothing in that opinion to indicate that a different rule would have obtained if the arrest was on probable cause.

felony was being committed in their very presence. [Emphasis added.]

And in *Abel*, where the Court held that the search of living quarters incident to the arrest there on a deportation warrant was reasonable, the Court acknowledged the present vitality of the *Rabinowitz* rationale. In answer to the argument that the search was unreasonable because the deportation warrant of arrest was issued without judicial intervention or approval, the opinion observed (362 U.S. at 236):

But so is a search incidental to a criminal arrest made upon probable cause without a warrant, and under *Rabinowitz* 339 U.S., at 60, such a search does not require a judicial warrant for its validity.

See also *Henry v. United States*, 361 U.S. 98, 102.

Although it is true that there have been "strong and fluctuating differences of view" in search and seizure cases (*Abel v. United States*, *supra*, 362 U.S. at 235), these differences have not been based on the absence of an arrest warrant, but have arisen from divergent opinions as to the permissible range of search and the legality of seizure without a search warrant incident to a lawful arrest, regardless of whether the arrest was based on probable cause or on a warrant.³⁰ None of the cases in which the Court has

³⁰ See, e.g., the majority and dissenting opinions in *Davis v. United States*, 328 U.S. 582, 594; *Harris v. United States*, 331 U.S. 145, 155; *United States v. Rabinowitz*, 339 U.S. 56, 68; compare *Marron v. United States*, 275 U.S. 192, and *United States v. Trupiano*, 334 U.S. 699, with *Go-Bart Co. v. United States*, 282 U.S. 344, and *United States v. Lefkowitz*, 285 U.S. 452.

held searches incident to valid arrests illegal has been determined on the basis supporting the arrest. Thus, in *Trupiano v. United States*, 334 U.S. 699, it was not the absence of an arrest warrant which led the court to overturn the search based on the arrest as unreasonable; even though the arrest was valid, the Court held that the lack of a search warrant, where concededly there was ample time to obtain one, made the search illegal." Similarly, the searches and seizures in *Go-Bart Co. v. United States*, 282 U.S. 344, and *United States v. Lefkowitz*, 285 U.S. 452, were not held unreasonable because the search and seizure were incident to a warrantless arrest—indeed in *Lefkowitz* the arrest was pursuant to a valid arrest warrant. The Court held the searches unreasonable because of their broad range and scope. The officers in those cases did not enter the business premises to make an arrest, but rather "conduct[ed] a general exploratory search for merely evidentiary materials tending to connect the accused with some crime." *Harris v. United States*, *supra*, 331 U.S. at 153. These actions were condemned as "general exploratory searches, which cannot be undertaken by officers

²¹ Writing for the Court, Mr. Justice Murphy expressly made clear that, although the arrest without a warrant was valid, it did not justify the search without a warrant to search. See 334 U.S. at 704-705, 708. There is no intimation in his opinion that a different result would have been reached had an arrest warrant been obtained.

And "[t]o the extent that [*Trupiano*] * * * requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest," it has been overruled by *United States v. Rabinowitz*, *supra*, 339 U.S. at 66.

with or without a warrant." *United States v. Rabinowitz, supra*, 339 U.S. at 62.

In short, unless this Court is ready to overrule the *Harris* and *Rabinowitz* cases (which neither the dissenting judge below nor petitioner suggests), the search in this case was valid (if reasonable in scope and method) since the arrest on which it was based was valid. It cannot be held, consistently with those rulings, that, as a matter of law, a search and seizure incident to a lawful arrest—whether based on probable cause or a warrant—is invalid because it occurred in private premises and was without a search warrant. Under the prevailing principle of this Court, "[t]he relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable." *United States v. Rabinowitz, supra*, 339 U.S. at 66.²²

2. The search and seizure in this case were reasonable in scope and method. On the government's version of the events (as submitted to the motion judge), immediately following petitioner's arrest he was asked whether he would agree to a search of his premises. He responded that he knew what the agents were seeking and continued: "I have all the stuff in a suitcase in the

²² As this Court said in *United States v. Rabinowitz, supra*, 339 U.S. at 63: "What is a reasonable search is not to be determined by any fixed formula. * * * The recurring questions of reasonableness of searches must find resolution in the facts and circumstances of each case." See also *Harris v. United States, supra*, 331 U.S. at 150; *Go-Bart Co. v. United States, supra*, 282 U.S. at 357.

²³ At this point petitioner produced a locked metal box containing \$2,675 in cash.

closet. There's no use tearing the place apart." (R. 10, 77). Thereupon he took the agents into his bedroom (the arrest had been made in his living room) and pointed to a closet from which agent Costa removed a suitcase in which he found about one pound of heroin, a quantity of cocaine and paraphernalia used to "cut" narcotics (R. 10). The agents, after requesting petitioner to take possession of his valuables," conducted a search of the apartment which turned up \$6,000 in cash in a shoe box found hidden in petitioner's closet. Petitioner, on the other hand, denied that he had consented to the search, asserting by way of his counsel's affidavit that he had never given money or narcotics to the agents and that, following his arrest, he remained in the living room while the agents searched his apartment (R. 34).

Whether or not the search derived from petitioner's consent or was merely an incident to his lawful arrest, it was wholly reasonable." There is nothing to indicate that it even approached the duration or extent of the searches that this Court upheld in *Harris v. United States, supra*, where the defendant's four-room apartment was searched by five agents for approximately five hours, and *Agnello v. United States, supra*, where a four-room apartment was searched." Cf. *Abel v. United States, supra*, and *United States v. Rabinowitz, supra*. Admittedly, the facts in this case

¹¹ As the majority below concluded: "Under either version it does not appear that the search of [petitioner's] apartment was an unreasonable one" (R. 95-96, note 1).

¹² See Record in No. 6, Oct. Term, 1925, pp. 62, 129, 219.

as to the duration and extent of the search are not entirely clear in either the government's or petitioner's versions of the arrest, the search and the seizure. It was petitioner's burden, however, to present at least a *prima facie* case that the search was unreasonable. Insofar as the evidence is vague, he has failed to sustain this burden. But, in any event, the record strongly indicates that the search was quite limited, both in scope and duration.

It is clear that there was not in this case the exploratory and indiscriminate ransacking of the "entire contents" of a house, including an exhaustive number of items obviously having no bearing or connection at all with the particular crime for which the defendants were arrested, which invalidated the seizure in *Kremen v. United States*, 353 U.S. 346, 349-359. Nor was there the sweeping search and seizure of private papers which marked the search in *Go-Bart* and *Lefkowitz, supra*; cf. *Gouled v. United States*, 255 U.S. 298, 308-310. The items seized as a result of this particularized search (contraband narcotics, the tools for its use, and the profits of petitioner's involvement in the narcotics traffic) were the instrumentalities and fruits of the crime for which petitioner was arrested. And since contraband, although not the subject of the original search, is properly subject to seizure if accidentally discovered in the course of a valid search (*Harris v. United States, supra*), *a fortiori* the items involved here, which were intimately related to the same crime for which petitioner was arrested, were properly seized by the agents.

CONCLUSION

If the Court agrees with the government's contention discussed in Point I, *supra*, pp. 21-52, that the order denying the motion to suppress was interlocutory and nonappealable, then the judgment below should be vacated and the cause remanded with directions that the appeal be dismissed. If the Court believes that the order was independently appealable, then, for the reasons set forth in Point II, *supra*, pp. 52-81, it is submitted that the judgment below should be affirmed.

Respectfully submitted.

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Office Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1961

No. 21

MARIO DiBELLA,

Petitioner.

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States

October Term, 1961

No. 21

MARIO DiBELLA,

Petitioner,

— v. —

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR PETITIONER

**I. Applicability of the Order Denying the
Motion to Suppress**

In its Brief in opposition to the petition for a writ of certiorari, the Government presented only one question, "whether the district court properly denied a motion to suppress evidence obtained during the course of a valid arrest" (Br. in opp. 1). The Government did argue that it did not believe the order appealable (*id.*, 6); that while the decision below is in conflict with *Zacarias* and *Saba*, this conflict cannot justify a grant of the writ of certiorari in the instant case (*id.* 7). But the Government did not request or seek a determination by this Court of the appealability issue.

Now, in the Brief on the merits, the Government devotes more than half its argument to the contention that this Court vacate the judgment of the Court of Appeals and remand the within cause with directions that it be dismissed because the order denying the motion to suppress was interlocutory and non-appealable.

If the Government had wished to overturn that portion of the judgment below which is unfavorable to it (appealability of order), it should have filed a separate petition for certiorari, designated as a cross-petition or a conditional cross-petition asking that it be granted only if the petition in chief were granted. The Government, not having sought review of that portion of the judgment in the court below pertaining to the issue of appealability, cannot now attack it. The question of the appealability of the order denying petitioner's motion to suppress should not be reviewed by this Court.

In *Morley Co. v. Md. Casualty Co.*, 300 U. S. 185, 191-192, this Court stated:

"Without a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. *United States v. American Railway Express Co.*, 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to attack the decree, with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. The rule is inveterate and certain * * * Where each

party appeals, each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken".

In *LeTulle v. Scofield*, 308 U. S. 415, 421-422, this Court said:

"A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him".

In *Standard Acc. Ins. Co., v. Roberts*, 132 F. 2d 794, 795, (8 Cir.) the court held that since appellees' contentions as to reformation of the policy and as to allowance of attorney fees and penalty seek to change or to add to the relief accorded by the judgment which was in their favor, they can raise such issues only by a cross-appeal.

The motion to suppress was argued in the District Court on August 25, 1959 (R. A. 1). During the oral argument, the District Judge stated, "Any order to be entered on this motion is appealable" (R. 79a).

In its argument before the Court of Appeals, the Government raised the question of appealability and the Court below, citing an unbroken line of cases dating from 1930, stated, "Over a period of many years, this Court has consistently held that where the application is made prior to

the indictment, as it is in this case, that a defendant may appeal to this Court from an order denying his motion to suppress" (R. 94, 105).

If the Government now prevails upon this Court to find that the order denying petitioner's motion to suppress is not appealable and to refrain from judging this cause on its merits, petitioner would be penalized because of his reliance upon a precedent firmly established for the past thirty years by decisions of the Second Circuit and the vast majority of the other Circuits (see Appendix A to this Reply Brief listing all of the pertinent decisions); and by the decisions of this Court in *Perlman v. United States*, 247 U. S. 7; *Burdeau v. McDowell*, 256 U. S. 465; *Steele v. United States*, No. 1, 267 U. S. 498; *Cogen v. United States*, 278 U. S. 221, 225; *Go-Bart Co. v. United States*, 282 U. S. 344, 356; *Carroll v. United States*, 354 U. S. 394, 403-404.

If the Government's contention of non-appealability be upheld, then petitioner would be compelled to travel the circuitous route of a trial in the District Court, an appeal to the Court of Appeals, a petition for a writ of certiorari to this Court, and if the petition be granted then and only then would the very grave and important questions as to the unlawfulness and unreasonableness of the search and seizure in this case, questions which this Court has already determined to be worthy of review on the merits, be finally determined. This procedure would be most oppressive and would present a financial barrier that this petitioner could simply never surmount.

The words "final decision" have, as applied to the appealability question here presented, not been understood

in a strict and technical sense but have been given a liberal and reasonable construction. *United States v. Cefaratti*, 91 U. S. App. D. C. 297, 202 F. 2d 13, 15.

It is respectfully submitted that this proceeding be judged solely upon its own particular facts and circumstances in regard to the appealability question, taking into consideration petitioner's reliance upon the many decisions of the preponderant number of Courts of Appeals and of this Court and of the grave constitutional questions herein that call for a speedy determination because their resolution is so vital to the administration of justice in the Federal Courts.

If the delay in the prosecution of petitioner were in anywise due to dilatory tactics by him, then the Government's concern "that this delay would interfere seriously in the proper administration of criminal justice", would be more understandable (Gov't. Br. 22). However, a reading of the docket entries in the District Court (R.A., 2a), and petitioner's typewritten reply brief in the Court below, clearly show that any delay in a speedy determination of this proceeding was occasioned by the Government¹ (Appendix B, pp. 3a-5a). At no time has the Government ever denied the statements that appear in said reply brief as to the events depicted therein.

In the event that the Court may decide to resolve the question of appealability, we submit the following additional argument:

¹ A certified carbon copy of petitioner's original reply brief was obtained from the Clerk of the Court of Appeals and forwarded to the Clerk of this Court with the request that it be made part of the record.

In *United States v. Poller*, 43 F. 2d 911 (2 Cir., 1930), Judge Learned Hand, speaking for the Court, said:

"If this proceeding had been concluded before indictment found, the order certainly would have been appealable (citing, *Perlman v. United States*, 247 U. S. 7; *Burdeau v. McDowell*, 256 U. S. 465). The point here taken is that Poller was indicted before final submission of the proceeding; that immediately upon indictment found, it became a part of the prosecution. Or, if that not be true, then in any event that Poller was arraigned before a commissioner and held to bail before the proceeding was even started. As to the second objection, it is enough to say that the proceedings before the commissioner were in no event part of the prosecution, nor indeed was the commissioner a court at all. * * * It seems to us more reasonable to say that it is the time of the initiation which counts, and for this we have the language of the opinion in *Cogen v. United States*, 278 U. S. 225. * * * We hold therefore that it is the beginning of the proceeding which determines the appealability of the order, and that since this was before indictment, we have jurisdiction of the cause."

In *Carroll v. United States*, 354 U. S. 394, 403-404 (1957) it was stated:

"Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the *motion is made prior to indictment*. * * * But a motion made by a defendant after indictment and in the district of the trial has none of the aspects of independence just noted, as the court held in *Cogen v. United States*, 278 U. S. 221."

In *Go-Bart Co. v. United States*, 282 U. S. 344, 356, this Court said:

"When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them. * * * It follows that the order of the district court was not made in or dependent upon any case or proceeding there pending and therefore the order as to them was appealable."

The independent character of summary proceedings is clear whenever the motion is filed before there is any indictment or information against the movant. *Cogen v. United States*, 278 U. S. 221, 225.

The Government urges this Court to draw a distinction between a motion to suppress which asks for the return of property and one which does not (Gov't. Br. 29, 31, 38, 41, 46-52). This issue was passed upon by this Court in *Carroll v. United States*, *supra* (at 403-404):

"Earlier cases illustrated, sometimes without discussion that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment * * * .

"We do not suggest that a motion made under Rule 41 (e) gains or loses appealability simply upon whether it asks return or suppression or both" (*id.* n. 404).

The Government cites no case in this Court to sustain its position nor does it make any reference in its brief to the above footnote at page 404 of the *Carroll* case.

When petitioner was arrested and arraigned before a United States Commissioner and bound over for action by a Grand Jury, he was not a defendant in any criminal action but a suspect against whom an indictment or information might never be filed. The papers before the Commissioner are not turned over to the Clerk of the District Court, but remain with the Commissioner until an indictment or information is filed with the Court Clerk. The motion to suppress in this case was made prior to the filing of an indictment. Since there were no papers or proceedings pending in the District Court, this motion was a miscellaneous proceeding (R. A. 1), which required the payment of a \$15.00 filing fee. The docket entries do not reflect the filing of the indictment because an indictment is not deemed a part of the miscellaneous proceedings (R. A. 1-2). If petitioner had made his motion to suppress after the indictment had been filed, then it would have received a criminal number and no filing fee would have been required. The fact that an indictment was found subsequent to petitioner's motion to suppress cannot have the retroactive effect of charging petitioner with knowledge that at the time he made his motion to suppress, he knew that in the future he would be indicted. As was said in *United States v. Poller, supra*, "it is the beginning of the proceeding which determines the appealability of the order."

Moreover, the proceedings before the Commissioner were in no event part of the prosecution, nor indeed was the Commissioner a court at all. *United States v. Poller, supra*.

It was said by this Court in *Go-Bart Co. v. United States, supra* (282 U. S. at 354-356):

"All the commissioner's acts and the things done by the prohibition officers in respect of this matter were

preparatory and preliminary to a consideration of the charge by a grand jury, and, if an indictment should be found, the final disposition of the case in the district court. The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which the court had authority to take control at any time" (citing cases).

In *Freeman v. United States*, 9 Cir., 160 F. 2d 69, 70, the court said:

"Commissioners proceedings are quasi-judicial in character. The issue before him is not guilt or innocence but probable cause for the arrest of the person charged. After the Commissioner has issued his order for the arrest and commitment of the person complained of, the proceeding before him is ended and his jurisdiction exhausted. It was not until the commissioner's jurisdiction was so exhausted that the instant proceeding was brought before the district court. It is obvious that it was not a part of the commissioner's proceeding of which there had been such final disposition."

In our case, petitioner had waived hearing before the Commissioner, bail was fixed and he was bound over for grand jury action. The Commissioner's jurisdiction was then exhausted and until an indictment was found there were no criminal proceedings pending against petitioner. Since petitioner's motion to suppress was made prior to the indictment, it was made at a time when there were no criminal proceedings against petitioner. His motion to suppress was in the nature of a special proceeding and appealable.

Essgee Company of China v. United States, 262 U. S. 151.

II. The Search and Seizure

In the oral argument before the District Court, government counsel stated during the five months lapse of time from October 15th (issuance of warrant of arrest) to March 9th (date of arrest), the agents were trying to find out who was associated with petitioner in the narcotics traffic and not proving successful they went ahead and arrested him in the apartment using the old warrant that they had outstanding for his arrest (R. 75a-76a). The Court at this point remarked, "Then using the arrest for a basis for making a search of the premises" (R. 76a).

It is conceded by the Government that the narcotic agents had petitioner under *close* surveillance for at least five months before arrest (Gov't Br. 54). They could have apprehended him at anytime on the sidewalk in front of his home. Since there were no special or necessitous circumstances requiring immediate action by the agents,—such as that petitioner was about to flee or contraband would be destroyed (the government never offered any proof to such effect)—there was no reason or justification for them to enter petitioner's apartment and arrest him. The agents undoubtedly knew that if they arrested petitioner on the sidewalk, they could not thereafter search his home and use the arrest as a basis to sustain a warrantless search. A search must be made contemporaneous with the arrest. *Agnello v. United States*, 269 U. S. 20.

It was said in *McKnight v. United States*, 183 F. 2d 183 297 (C.A.D.C.), that where police officers waited until the defendant had entered his home before arresting him, the real purpose was not to arrest the defendant but to search his apartment and to call this seizure incident to this ar-

rest is like saying that cashing a check is incident to writing it. Means are incident to ends, not ends to means.

See:

United States v. Johnson, 113 F. Supp 359 (D.C.);
Accarrino v. United States, 179 F. 2d 456
 (C.A.D.C.).

If a narcotics agent be permitted to make a search of a person's residence, particularly in the nighttime, as an incident to a warrantless arrest based on reasonable grounds that the suspect had committed a crime in the past, then such arrest is the equivalent of a general search warrant.

If the judgment of the lower court be affirmed, narcotic agents can blithely ignore the Fourth Amendment by entering a person's dwelling irrespective of the time of night or day upon reasonable grounds to believe that a crime had been committed (in our case six months prior to the arrest) in the absence of special circumstances (suspect about to flee or contraband likely to be destroyed), though there was ample time to obtain a warrant; no crime being committed in their presence or any reasonable grounds to believe that a crime was being committed; and, absent the knowledge that contraband was in the apartment, make an arrest and then search the apartment as an incident thereto. Congress never intended to give such awesome powers to narcotic agents. To do so would emasculate the Fourth Amendment.

The Government in attempting to excuse and explain away the unwarranted and unreasonable delay of six months before arresting petitioner has cited *United States v. Rabinowitz*, 339 U. S. 56, and *Carlo v. United States*, 286 F. 2d

841 (Gov't. Br. 54-56). These cases indicate the unreasonableness of the arrest of petitioner.

In *United States v. Rabinowitz*, *supra*, page 65, this Court said:

"The judgment of the officers as to when to close a trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant".

In our case, no crime was being committed in the presence of the agents, nor did the Government ever offer any proof, either orally or by affidavit, that the agents had reasonable grounds to believe that petitioner was committing a crime when they entered his apartment.

In *Carlo v. United States*, *supra*, 286 F. 2d at p. 846, decided February 9, 1961, three months after the decision in the instant case, the Court of Appeals for the Second Circuit speaking through Medina, J. said:

"Delay by enforcement officers in arresting a suspect does not ordinarily affect the legality of the arrest. Here the delay was three months, and we have no reason to suppose that the arrest could have been made sooner than it was made. In *DiBella v. United States*, decided by this Court on November 23, 1960, and not yet officially reported, Judge Waterman states in his dissenting opinion that DiBella had 'been under surveillance for seven months', before his arrest and after the alleged commission of the crime for which he was arrested. Law enforcement officers have the right to wait in the hope that they may strengthen their case by ferreting out further evidence or discovering and identifying confederates

and collaborators. But every time there is a delay in the making of the arrest and there is a search made as incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search. (Citing cases). * * * In other words, the delay in making the arrest is one of the factors to be taken into consideration when the time comes for a judicial determination of the question of whether or not the search was 'reasonable'. * * * All the attendant circumstances, including the delay in making the arrest and the reasons for such delay must be taken into consideration''.

In *Carlo v. United States*, *supra* (p. 849), Smith, J., in a concurring opinion analyzed this facet of the law and said:

"It is not necessary to determine here, however, that the arrest may be justified as of one 'who has committed such violation' solely by the knowledge of the February 17th transaction. Such a justification may be questionable in view of the failure, so far as the record discloses, to make any effort to obtain and serve a warrant in the period between February 17 and May 24. There was plenty of time to obtain a warrant of arrest in the more than three months intervening. While the language of the statute and the legislative history are not specific as to the time within which the stated officers are to act, arrest without warrant may well have been authorized by the Congress primarily in order to permit prompt action in a situation where abandonment or surveillance and delay while obtaining a warrant might cause escape or destruction of evidence. Even a warrant, obtained in obedience to to the Constitutional requirements for warrants of arrest should be executed with reasonable promptness or it may be-

come stale. *United States v. Joines*, 258 F. 2d 471 (3 Cir. 1958), *Seymour v. United States*, 177 F. 2d 732 (D.C. Cir. 1949). An exception by necessity carved out of the Constitutional requirement should not be allowed greater breadth. However, if the agents were reasonably justified in a belief that at the time of the arrest on May 24 or within a reasonable time prior thereto DiCarlo was engaged in a narcotics transaction, the arrest and the subsequent search of the bag must be held valid under the statute " * * * ".

In our case, the Government never adduced one iota of proof that at the time of petitioner's arrest, he was engaged in a narcotics transaction. There was no proof that at a reasonable time prior to petitioner's arrest he was engaged in a narcotics transaction (R. 75a-76a). The Government's proof that petitioner had been engaged in narcotics transactions was confined solely to the two affidavits of Agents Moynihan and Costa executed on October 6, 1958, as to events that allegedly occurred on August 26 and September 10, 1958. Based on these two affidavits, Commissioner Abruzzo had denied a search warrant (R. 51a-52a). The September 10th occurrence was six months prior to petitioner's arrest (R. 22a).

A warrant of arrest executed six months after its issuance is unreasonable and stale. *A fortiori*, a warrantless arrest made on reasonable grounds that a suspect had committed a crime six months prior to his arrest is unreasonable and stale.

The search of petitioner's apartment was made incidental to an unreasonable and stale arrest. The search was therefore unlawful and unreasonable.

Conclusion

Petitioner's motion to suppress evidence having been made prior to the filing of an indictment, the order entered thereon was appealable.

The particular facts, circumstances and the over-all atmosphere surrounding the arrest of petitioner and the search of his apartment point to an unreasonable search and seizure in violation of the Fourth Amendment.

The judgment appealed from should be reversed.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner

APPENDIX A

First Circuit: *Centracchio v. Garrity*, 1 Cir, 198 F. 2d 382, 389, cert. denied 344 U. S. 866 (before indictment, order appealable).

Second Circuit: *Cheng Wai v. United States*, 2 Cir, 125 F. 2d 915 (before indictment, order appealable); *United States v. Poller*, 2 Cir, 43 F. 2d 911, (after proceedings before commissioner, order appealable).

Third Circuit: *United States v. Bianco*, 3 Cir, 189 F. 2d 716 (before indictment, order appealable); *Re Sana Laboratories, Inc.*, 3 Cir, 115 F. 2d 717, cert. denied sub nom. *Sana Laboratories, Inc. v. United States*, 312 U. S. 688 (after indictment, order appealable).

Fourth Circuit: *United States v. Williams*, 4 Cir, 227 F. 2d 149 (before indictment, order not appealable).

Fifth Circuit: *Zacarias v. United States*, 5 Cir, 261 F. 2d 416, cert. denied, 359 U. S. 935 (before indictment, order not appealable); *Peterson v. United States*, 5 Cir, 260 F. 2d 265 (after indictment, order not appealable); *United States v. Ashby*, 5 Cir, 245 F. 2d 684 (order granting motion to suppress after indictment appealable).

Sixth Circuit: *Dowling v. Collins*, 6 Cir, 10 F. 2d 62 (order on motion to suppress, final and appealable).

Seventh Circuit: *United States v. One 1946 Plymouth Sedan Automobile*, 7 Cir, 167 F. 2d 3 (proceeding to suppress after indictment, not appealable; it was not an independent proceeding brought before indictment).

Eighth Circuit: *Goodman v. Lane*, 8 Cir, 48 F. 2d 32 (appealable, even though indictment later returned).

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Ninth Circuit: United States v. Sugden, 9 Cir, 226 F. 2d 281, affirmed mem. 351 U. S. 916 (after indictment and dismissal, order appealable); Weldon v. United States, 9 Cir, 196 F. 2d 874 (before indictment or information, after complaint, arrest, and arraignment, order appealable); Freeman v. United States, 9 Cir, 160 F. 2d 69 (after complaint and hearing before Commissioner, before indictment, order appealable); United States v. Rosenwasser, 9 Cir, 145 F. 2d 1015 (before indictment, order appealable).

District of Columbia Circuit: United States v. Cefaratti, 91 U. S. App. D. C. 297, 202 F. 2d 13 (order granting motion to suppress after indictment appealable, order denying motion to suppress before indictment appealable); Nelson v. United States, 93 App. D. C. 14, 202 F. 2d 505, cert denied 346 U. S. 827 (order entered before indictment filed appealable, order entered after indictment filed usually interlocutory); United States v. Stephenson, 96 U. S. App. D. C., 223 F. 2d 336 (after indictment, order not appealable).

APPENDIX B**UNITED STATES COURT OF APPEALS****FOR THE SECOND CIRCUIT**

IN THE MATTER OF THE APPLICATION**OF****MARIO DiBELLA**

for an order suppressing all evidentiary items seized by Agents of the Federal Bureau of Narcotics on or about March 9th, 1959, in premises No. 35-15 80th Street, Jackson Heights, Queens, New York.

MARIO DiBELLA,**Appellant,****UNITED STATES OF AMERICA,****Appellee.**

APPELLANT'S REPLY BRIEF**POINT I****THE ORDER OF THE DISTRICT COURT DENYING APPELLANT'S
MOTION TO SUPPRESS IS APPEALABLE**

Appellant was arrested at approximately 8:15 P.M. on March 9, 1959. He was arraigned the following day, where he waived preliminary hearing, was released on bail and

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was bound over for grand jury action. On June 17, 1959, notice of the motion to suppress was served and filed on behalf of the Appellant, returnable July 6, 1959. On July 2, 1959, fifteen days after service of the notice of motion to suppress and approximately three months after the Appellant had been arraigned, an indictment was returned against the Appellant.

On July 6, 1959, the return date of the motion, the Government over the strenuous objections of Appellant's attorney obtained an adjournment to August 3rd (45a-46a). On August 3, 1959, the Government obtained another adjournment to August 24th. The motion to suppress was argued on August 25th. The Government requested additional time to file opposing papers, and the request was granted and the Government was advised to have their papers in by September 8th. On September 7th, the Government's request for further time was granted to September 11th (45a-46a).

This chronological sequence of events is set forth for the express purpose of showing that were it not for the procrastination of the Government, this appeal would have been heard last year.

It would be a futile gesture not to decide the appeal at this time and remand it to the attention of the Trial Court. This case cannot be tried until the latter part of the year. In the event of an appeal, it could not be heard until the spring of 1961. Approximately, one year will have elapsed, if this issue is referred to the Trial Court.

It is significant that after the notice of appeal was filed further proceedings remained at a standstill because the Government stated to Appellant's counsel, that a motion

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would be made to dismiss the appeal on the grounds that the order denying the motion to suppress was non-appealable. After a lapse of several months, Appellant's counsel was notified to perfect his appeal because the Government on the basis of *Russo v. United States*, 241 F. 2d 288 now believed that the said order was appealable.

In view of the aforesaid statement, this turn-a-bout on the part of the Government is surprising. It is not contended that the Government does not have the right to change its mind, but the delay in processing this appeal is attributable solely to the tactics employed by the Government.

This Court in *Cheng Wai v. United States*, 2d Cir. 125 F. 2d 915, 916, succinctly and cogently stated its views by saying that since the proceeding to suppress evidence was commenced before any indictment against the Appellant, it is clear upon the authorities, that it is an independent proceeding and the order made therein is appealable.

A motion to suppress made before the return of the indictment, as in our case, is generally regarded as an independent proceeding. The decision on the motion is regarded as a final order and an appeal from that decision may be taken.

United States v. Poller, 2d Cir., 43 F. 2d 911
Russo v. United States, 2d Cir., 241 F. 2d 288
Perlman v. United States, 247 U. S. 7
Application of Fried, 68 F. Supp. 961

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POINT II

AGENT COSTA DID NOT HAVE SUFFICIENT PROBABLE CAUSE
TO ARREST DiBella UNDER THE NARCOTICS CONTROL ACT.

Agent Costa never had any dealings or conversations with the co-defendant, Panzarella (25a-27a). The alleged conversation had between Agent Moynihan and Panzarella was allegedly told by Moynihan to Costa. This would be hearsay upon hearsay and an unwarranted extension of *Draper v. United States*, 358 U. S. 307 and *Jones v. United States*, 80 S. Ct., 725.

In *United States v. Pearce*, 275 F. 2d 318, the agent who had made the affidavit for a search warrant alleged facts upon information and belief and it developed that his information had been received from his superior officer, who had received it from another F.B.I. agent, who in turn had received the information from an informer. The Court held (p. 324):

"In our judgment, the affidavit for search warrant was insufficient to justify the issuance of a search warrant, and the search and seizure made pursuant thereto was unlawful and in violation of the constitutional rights of the defendants. It follows that the evidence obtained as a result of such search should have been suppressed."

It is significant that Agent Moynihan was not one of the arresting agents. Agent Costa who made the arrest might have had strong reason to suspect DiBella but that was not enough to support a warrant of arrest.

*Appendix B**Henry v. United States*, 80 S. Ct. 168, 170*Johnson v. United States*, 333 U. S. 10, 13-15

A fortiori, it would not support an arrest on reasonable grounds under the Narcotics Control Act, since probable cause under the Fourth Amendment and reasonable grounds under the Narcotics Control Act are substantial equivalents.

Draper v. United States, 358 U. S. 307

Every case involving the question of an unlawful search and seizure must be decided on its own particular facts.

In our case, the Government takes the incongruous position that since Costa had been told by his fellow agent Moynihan of his (Moynihan's) conversation with Panzarella, that such information coming from Moynihan must be regarded as information coming from a "reliable informant." Whatever information Moynihan received from Panzarella and which he then imparted to Costa could be no better than the information given by Panzarella to Moynihan. The Government at no time in any of the agents' affidavits or in the opposing affidavit of Assistant United State Attorney Charles L. Stewart (8a-31a, incl.) or in its opposing brief has ever characterized Panzarella as a reliable informant. The information given to Moynihan by Panzarella did not come from a reliable informant and it thus follows that Moynihan, when he told Costa of his conversation with Panzarella, did not convey to Costa information from a reliable informant. The title of Federal Agent cannot transform information from an informant to information from a reliable informant.

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Under the Narcotics Control Act, a Narcotics Agent has the right to make an arrest where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation. *The Act does not state how, where and under what circumstances such arrest can be made.*

In order to justify the entrance into a person's apartment in the night time to make an arrest, the Government has the burden of proving the necessity for such an entry. The fact that subsequent to Appellant's arrest, the Agents found narcotics in his apartment does not justify the arrest.

An arrest is not justified by what a subsequent search discloses.

Henry v. United States, supra.

The Government failed to sustain its burden of proof because it did not submit any affidavits from any of the arresting agents to explain or justify its night time entry into Appellant's apartment.

The postulate by the Government that it had reasonable grounds to enter Appellant's apartment, arrest him and search the apartment, must fall because of the rulings of this Court in *United States v. Garnes*, 258 F. 2d 530; *United States v. Kancso*, 252 F. 2d 220 and *United States v. Volkell*, 251 F. 2d 333.

Garnes, Kancso and Volkell explicitly hold that the Government must show that its agents had reasonable grounds to believe that the defendant had committed violations of the narcotic laws; that the agents had reason to believe that contraband was in the premises; that the agents had reason

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to believe that evidence or contraband would be removed or destroyed; that the agents had to act at once or the defendant would flee. None of the aforesaid reasons appear in our case. The entry of the agents into Appellant's apartment was unlawful; their arrest invalid; their search illegal.

It is incumbent upon the Government not only to prove its agents had reasonable grounds to make the arrest but it must also prove that the agents had reasonable grounds to enter the apartment to make the arrest.

In *Jones v. United States*, 357 U. S. 493, a daytime search warrant had expired and the agents entered petitioner's apartment and proceeded to make a search.

The Government maintained that the search and seizure were justifiable as incident to petitioner's lawful arrest, because they had authority under federal law to arrest without a warrant upon probable cause to believe that a person had committed a felony. The Court said (pgs. 499, 500):

" . . . These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person believed within upon probable cause, that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.* But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government. The testimony of the federal officers make clear beyond dispute that

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their purpose in entering was to search for distilling equipment, and not to arrest petitioner. Since the evidence obtained through this unlawful search was admitted at the trial, the judgment of the Court of Appeals must be reversed."

The contention of the Government in the present case, that although Appellant was arrested under a warrant of arrest, if the warrant be adjudged invalid, nevertheless, the arrest and search can be justified by recourse to the Narcotics Control Act is not justified by the facts, for the record fails to support this new theory now advanced by the Government.

Moreover, there was no proof adduced by any affidavit from any arresting agent that indicates any reasonable grounds to make a nighttime entry into Appellant's apartment. The record makes clear beyond dispute, that their purpose in entering Appellant's apartment was to search for contraband and not to arrest Appellant.

The Narcotics Control Act was enacted by Congress to aid the Narcotics Bureau in apprehending narcotic traffickers. It was never the intention of Congress in passing this legislation to circumvent the Fourth Amendment. If it was the thought of Congress that the Narcotics Control Act could be used as a substitute for the Fourth Amendment, this legislation would be unconstitutional.

It was said in *Nathanson v. United States*, 290 U. S. 41:

"The Amendment (4th) applies to warrants under any statute, revenue, tariff and all others. No warrant inhibited by it, can be made effective by any act of Congress or otherwise."

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In the present case, we find this very unusual situation. An application for a search warrant of Appellant's premises was denied by United States Commissioner Abruzzo on October 6, 1958 (53a). A warrant to arrest the Appellant was issued by United States Commissioner Epstein on October 6, 1958 (21a-22a). This warrant of arrest was invalid because it was issued on a complaint that was unquestionably defective. Parenthetically, it should be noted that the Government realizes the defectiveness of the complaint but attempts to excuse it away by stating in its brief that the complaint was inexpertly drawn. Appellant agrees that the complaint was inexpertly drawn because the complaint does not allege sufficient essential facts constituting the offense charged. In the face of a denial of a search warrant and the utilization of an invalid warrant of arrest, the Government now contends that its agents have the right to arrest the Appellant and search his apartment by virtue of the Narcotics Control Act. However, the agents arrested the Appellant based on a warrant of arrest. The return on the warrant filed by Agent Costa in the Clerk's Office attests to this fact (22a). On the oral argument of the motion, Assistant United States Attorney Stewart said (76a):

" * * * they (agents) went ahead and arrested him in the apartment using the old warrant that they had outstanding for his arrest."

The Court: "Then using the arrest for a basis for making a search of the premises."

It is apparent that the thought of arresting Appellant without a warrant never entered the minds of the arresting

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agents. This new theory of law now propounded by the Government is purely a creature of the mental creativeness of the United States Attorney.

The Government's contention would, in effect, permit its narcotics agents to enter a suspect's home at any time of the day or night, without a search warrant or a warrant of arrest and in the absence of exceptional circumstances or exigencies as long as the agent believed that he had reasonable grounds under the Narcotics Control Act to arrest the suspect and then as an incident of the arrest to search the apartment. If this contention be correct, then the Fourth Amendment does not apply to the actions taken by a Narcotics Agent.

In *United States v. Jeffers*, 342 U. S. 48, the Supreme Court held that the Fourth Amendment applied to the seizure of narcotics. The Court stated that only where it was incident to a lawful arrest or in exceptional circumstances may an exception lie for a search and seizure without a warrant; that the burden is on those seeking the exemption to show the need for it.

POINT III**THE NARCOTICS FOUND IN APPELLANT'S APARTMENT WERE NOT VOLUNTARILY TURNED OVER TO THE AGENTS**

The Government, in its brief, contends that the Appellant voluntarily turned over the narcotics to the agents. It cites the record (10a) in support of this assertion. A reading of the record reveals that this allegation was made by Assistant United States Attorney Stewart, who was not present

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at the time of the arrest. This hearsay statement pertains to evidentiary matter and not to the obtaining of a warrant and must, therefore, be disregarded. Likewise, the further statement of Stewart that when DiBella was brought to the office of the United States Attorney, he (DiBella) admitted he had voluntarily turned over the seized heroin to the agents. Nowhere in his affidavit does Stewart allege that Appellant made this statement to him. This is another hearsay statement that should be disregarded. In contrast to these hearsay statements is the allegation of the Appellant in his sworn affidavit in support of the motion to suppress, wherein he states that agents of the Federal Bureau of Narcotics came into his apartment and after exhibiting to him a warrant of arrest, proceeded to make a general exploratory examination of his apartment (5a).

Assuming *arguendo*, that the narcotics were voluntarily turned over by Appellant to the agents, if the arrest warrant is invalid or if the arrest was made as a pretext to make a search, then the voluntary turning over the narcotics is of no consequence and the narcotics are inadmissible at the trial of this case.

CONCLUSION

The order denying the motion to suppress should be reversed.

Respectfully submitted,

JEROME LEWIS

Attorney for Appellant

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UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 12, inclusive, contain a true and complete copy of the Appellant's Reply Brief filed June 13, 1960.

IN THE MATTER OF THE APPLICATION

OF

MARIO DiBELLA,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fifth day of October in the year of our Lord one thousand nine hundred and sixty-one, and of the Independence of the said United States the one hundred and eighty-sixth.

A. DANIEL FUSARO
Clerk.

[SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 21

MARIO DiBELLA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

No. 93

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is in response to a request by Mr. Justice Frankfurter, made during the oral argument in these cases, for the reasoning of the courts of appeals on the question of the appealability of orders deciding motions seeking the suppression and/or re-

turn of evidence.¹ In this memorandum, we have summarized the position of each circuit on this issue including the basic rationale and authority which it has relied upon and the present trend, if any, which the more recent decisions seem to reveal. Following each summary, we have listed the relevant decisions in each circuit which our research has disclosed, with a short statement of the pertinent facts and holding in each case. A general summary of the position of the various circuits is set forth in our *Di Bella* brief, at pp. 43-46.

SECOND CIRCUIT²

Summary

1. The rule prevailing in the Second Circuit, as illustrated by the decision under review in *Di Bella*, is that the time of the return of the indictment is critical. Even before this Court held in *Carroll v. United States*, 354 U.S. 394, that an order entered on a motion to suppress, where the motion was filed after the return of indictment in the district of indictment,

¹ The relevant decisions of this Court are discussed in detail in our brief in *Di Bella*, at pp. 26, 27-34, 39-43, and in our brief in *Koenig*, at pp. 19-22, 25-31, 37-38.

² We start our summary and case compilation with the Second Circuit for two reasons: First, the question of appealability with regard to suppression and return motions, particularly before this Court's decision in *Cogen v. United States*, 378 U.S. 221, has been most litigated in the Second Circuit; and, second, the Second Circuit first articulated the rule that an order deciding a pre-indictment motion is independently appealable regardless of whether other factors show that the motion is a procedural step in a criminal case.

was interlocutory and not appealable, this was the rule in the Second Circuit. In contrast, the Second Circuit has consistently held that, if the motion to suppress was filed before indictment, the order is independent and appealable even though the motion was filed after a preliminary hearing before a commissioner. In addition, in that court's view the order on a motion brought before indictment does not lose its independent character even if an indictment has been returned before the motion is decided and the order entered.

The leading decision is *United States v. Poller*, 43 F. 2d 911, in which an order granting a pre-indictment motion for the return of a customs manifest, bills, records, and a check book seized incident to an arrest was held reviewable on appeal by the government. The decision was rendered after this Court's decision in *Perlman v. United States*, 247 U.S. 7, and *Cogen v. United States*, 278 U.S. 221 (discussed in our main brief in *DiBella*, pp. 27-34), and to some extent relies on those decisions as authority. But the rationale seems to be based on earlier decisions in the circuit which considered the power and jurisdiction of the district court to entertain summary applications for the return and suppression of evidence.

The jurisdiction of the district court on motions to suppress had been the subject of considerable litigation before the decision in *Poller*. It had been decided—both before and after this Court's decision in *Cogen*, *supra*—that power existed in the district court to decide a motion to suppress or return only if the material seized was in the possession of an officer of

the district court (e.g., an attorney), or if the motion was incidental to an action already pending in that court, or if it related to a writ or process issued by that court.¹ At the same time the question arose as to whether the district court had power to entertain a motion for the return of property seized under a search warrant which has been issued by a commissioner or magistrate. In *United States v. Maresca*, 266 Fed. 713, 723-724 (S.D. N.Y.), where the government sought to overturn a commissioner's decision quashing a search warrant, the district court held it had no power to interfere with that decision because "when a Commissioner issues criminal process, including a search warrant, he does it in and as part of the proceedings of the District Court" as a "judicial officer" who has "equal power with any judge authorized to hold a District Court." The theory of *Maresca* was soon rejected, however, by Judge Learned Hand in *United States v. Casino*, 286 Fed. 976 (S.D.N.Y.). In that case Judge Hand stated that proceedings before a commissioner or magistrate, sitting to issue warrants, were not judicial proceedings at all and thus were subject to *de novo* review in the district court. Judge Hand's conclusion in this regard was based, in large measure, on this Court's decision in

¹ See, e.g., *United States v. Maresca*, 266 Fed. 713 (S.D. N.Y.); *Weinstein v. Attorney General*, 271 Fed. 673, affirming *In re Weinstein*, 271 Fed. 5 (S.D. N.Y.); *Cogen v. United States*, 24 F. 2d 808, affirmed, 278 U.S. 221; *In re Bahrens*, 39 F. 2d 561; cf. *Applyde v. United States*, 32 F. 2d 873 (C.A. 9).

Todd v. United States, 158 U.S. 278,⁴ and his view was thereafter followed by the court of appeals in *In re No. 191 Front St.*, 5 F. 2d 282, 286.

The question of the function and authority of a commissioner reappeared as a critical consideration in the *Poller* case. The government argued that, even though the motion was made before the return of the indictment, the order was not independently appealable because the criminal case had been begun, before the motion had been made, by arraignment proceedings before a commissioner. Judge Hand responded (43 F. 2d at 912), "[a]s to the second objection, it is enough to say that the proceedings before the commissioner were in no event part of the prosecution, nor indeed was the commissioner a court at all." Thus, the reasoning that a preliminary hearing before a magistrate is not part of the criminal case seems to be the basic rationale underlying the Second Circuit rule that pre-indictment motions are not part of the criminal case (regardless of whether they are filed before or after a preliminary hearing) and are therefore appealable as independent proceedings.

The Second Circuit also held in the *Poller* case that the return of the indictment while the motion was pending did not make the order deciding the motion appealable. The court stated that "[c]onceivably it might be held that the proceeding became merged in the indictment, but the result would be

⁴ In *Todd*, this Court held that, for the purpose of the obstruction-of-justice statute, a preliminary examination before a commissioner was not a case pending in a court of the United States. Compare *Post v. United States*, 161 U.S. 583, 587.

to make the appealability of the order depend upon the diligence of the prosecution of the proceeding or of the judge in deciding it, either of which is an unsatisfactory test." 43 F. 2d at 912.

2. The Second Circuit has indicated, consistent with the earlier statement of this Court in *Cogen*, that a suppression order is appealable when the criminal case is pending in another district from that of trial. *United States v. Klapholz*, 230 F. 2d 494, certiorari denied, 351 U.S. 924. In *Klapholz*, the court based its decision at least in part on the view that, if the order were held non-appealable in such circumstances, it might still be considered to have a *res judicata* effect (but see our brief in *Koenig*, pp. 23, 26).

The Second Circuit has also held, again like this Court's earlier dictum in *Cogen*, that an order to suppress is independent and appealable when the motion is filed by a stranger to the criminal case. *Weinberg v. United States*, 126 F. 2d 1004. And it has indicated that an order denying a motion to suppress a confession on Fifth Amendment grounds is reviewable where the motion is brought before indictment. *In re Fried*, 161 F. 2d 453, certiorari dismissed, 332 U.S. 807.

Cases

1. *Post-indictment Motions*.—*Wise v. Mills*, 189 Fed. 583 (1911), involved an appeal by the United States Attorney from an order granting a post-indictment motion for the return of "books and papers" seized incident to arrest. The court of ap-

peals, without discussion, said that the order was interlocutory and not reviewable. The leading decision holding that an order on a motion brought after indictment is non-appealable is *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. 847 (1919), which involved the denial of a post-indictment motion for the return of books, papers, and memoranda seized under search warrants. The court of appeals reasoned that the order was interlocutory since the search warrants were issued in a criminal action, the defendants had been arrested, and they had been indicted. The court stated that the labelling of the action as an independent proceeding could not make an interlocutory order final since the proceeding in effect related to the criminal case. The *Coastwise* case has been generally followed: *Cogen v. United States*, 24 F. 2d 308 (1928), affirmed, 278 U.S. 221 (order denying a motion for the return of cards, papers and prescription blanks); *In re Bob*, 76 F. 2d 131 (1935) (order denying the return of books, papers, documents and records, seized under a subpoena *duces tecum*). See also *United States v. Kelley*, 105 F. 2d 912 (1939) (order denying a motion for the return of papers); *United States v. Hardy*, 252 F. 2d 780 (1958), certiorari denied, 356 U.S. 944.

An exception is *United States v. Kirschenblatt*, 16 F. 2d 202 (1926), where the government appealed from an order granting a post-indictment motion seeking the return of papers seized under a search warrant. The court of appeals considered the case on the merits without any discussion of appealability.

This case was referred to in *Cogen, supra*, as an illustration of a special, independent proceeding arising under the National Prohibition Act, which, this Court said, specially provides for "an independent proceeding, for the vacation of a warrant wrongfully issued and for return of property." 278 U.S. at 226. In *Carroll v. United States*, 354 U.S. 394, the Court explained this case as one "where the emphasis is on the return of property rather than its suppression as evidence." 354 U.S. at 404; emphasis in original.

2. *Pre-indictment Motions*.—The earliest cases in the Second Circuit involving orders on pre-indictment motions were reviewed on the merits without a discussion of appealability: *In re No. 191 Front St.*, 5 F. 2d 282 (1924) (order denying a motion to return books, telegrams, invoices, receipts, and letters seized under a search warrant); *In re Hollywood Cabaret*, 5 F. 2d 651 (1925) (orders denying motions to quash search warrants and for the return of seized alcohol); *Gallagher v. United States*, 6 F. 2d 758 (1925) (order denying a petition for the return of liquor seized under a search warrant issued under the National Prohibition Act); *United States v. Gowen*, 40 F. 2d 593 (1930), reversed on other grounds *sub nom. Go-Bart Co. v. United States*, 282 U.S. 344 (order denying a motion filed after a preliminary hearing for the restoration and suppression of miscellaneous papers seized by prohibition agents incident to arrest). All these decisions, except *Gowen*, were explained in *Cogen, supra*, 278 U.S. at 226, note 3, 227, note 5, as being based on the special procedures of the National Prohibition Act.

The leading pre-indictment case is *United States v. Poller*, 43 F. 2d 911 (1930), which we have discussed above (pp. 3-6). The *Poller* rule has been followed with little or no discussion in the following pre-indictment cases: *Lefkowitz v. United States Attorney*, 52 F. 2d 52 (1931), affirmed, 285 U.S. 452 (order denying a post-arrest application for the suppression and return of books and papers seized incident to a warrantless arrest); *Connolly v. Medalie*, 58 F. 2d 629 (1932) (order denying a post-arrest motion for the suppression of evidence seized in a brewery without a warrant); *In re Milburne*, 77 F. 2d 310 (1935) (order denying a motion for the return of whiskey, books, and papers seized without a warrant); *Landau v. United States*, 82 F. 2d 285 (1936) (order denying a petition to suppress a memorandum seized without a warrant); *United States v. Edelson*, 83 F. 2d 404 (1936) (appeal by the government from an order granting a post-arraignment motion for the return of alcohol seized without a warrant); *United States v. Preisen*, 96 F. 2d 138 (1938) (order denying a post-arrest motion for the suppression and return of alcohol and an automobile seized without a warrant); *Cheng Wai v. United States*, 125 F. 2d 915 (1942) (order denying a petition to suppress narcotics seized without a warrant); *United States v. Haberkorn*, 149 F. 2d 720 (1945) (order denying a petition for the return of an affidavit seized incident to arrest); *Lagow v. United States*, 159 F. 2d 245 (1946), certiorari denied, 331 U.S. 858 (order denying a motion

to suppress business records); *In re Fried*, 161 F. 2d 453 (1947), certiorari dismissed, 332 U.S. 807 (order denying a motion for the return and suppression of books and checks, as well as of a confession, sought to be used before a grand jury); *Lapides v. United States*, 215 F. 2d 253 (1954) (order filed after indictment dismissing a motion brought before any criminal action was started to suppress the use before a grand jury of income tax information disclosed to internal revenue agents); *Russo v. United States*, 241 F. 2d 285 (1951) (order entered after the return of an indictment denying a motion to suppress income tax information obtained by treasury agents); *DiBella v. United States*, 284 F. 2d 897 (1960), pending on writ of certiorari, No. 21 (order made after indictment denying a motion filed after arraignment to suppress narcotics seized incident to arrest); *Greene v. United States*, C.A. 2, decided December 5, 1961, pending on petition for a writ of certiorari, No. 55 (order denying a motion to suppress tax records allegedly secured through the deceit of agents of Internal Revenue Service). See also *In re Investigation by Attorney General*, 104 F. 2d 658 (1939) (relying on *Cogen* and *Perlman*, the court of appeals held that an order denying a motion to quash a subpoena *duces tecum* compelling the production of books and records before a grand jury was appealable; this decision was overruled *sub nom.* *In re Cudahy Packing Co.* in *Cobbledick v. United States*, 309 U.S. 323).

3. *Miscellaneous.*—*In re Brenner*, 6 F. 2d 425 (1925). The court held that an order denying an ap-

plication for the release of liquor seized under the National Prohibition Act, which was filed after the defendant was acquitted on the criminal charge, was reviewable. This case was referred to in *Cogen* for the proposition that motions filed after the criminal prosecution has ended are reviewable. 278 U.S. at 225-226.

Weinberg v. United States, 126 F. 2d 1004 (1942). An order was entered denying a petition filed in the Southern District of New York for the return of automobile parts seized in that district under an order of the District Court for the Eastern District of Michigan. The court of appeals pointed out that the movant was a stranger to the criminal proceedings in Michigan and, as to her, the order was final and appealable.

United States v. Klapholz, 230 F. 2d 494 (1956), certiorari denied, 351 U.S. 924. After an indictment had been returned in the Eastern District of New York, motions were filed by the defendant in the Southern District of New York to suppress materials seized under search warrants from a safe deposit box and the defendant's apartment, as well as all evidence obtained in the apartment. The court of appeals reviewed the order of the district court as to whether the Fourth or Fifth Amendments were violated, without discussing appealability. In considering whether Rule 5(a) of the Federal Rules of Criminal Procedure was violated, however, the court said that the proceedings on the motion were independent of any criminal case and the order was appealable since it was brought in a district other than that of indictment and therefore might

have a *res judicata* effect. This discussion, while not directed specifically to the motion based on the Fourth Amendment, was implicitly applicable to that motion.

Grant v. United States, 282 F. 2d 165 (1960). A pre-indictment order stayed the United States Attorney from submitting to the grand jury records and papers which the movant had made available to the Internal Revenue Service until a hearing was held on the motion to suppress. The court of appeals dismissed the government's attempt to appeal the stay order on the ground that only an order on the merits of the suppression motion would be appealable. The court discussed the general rules of appealability in the circuit, as we have described them.

FIRST CIRCUIT

Summary

The First Circuit's position upon the appealability of suppression orders is similar to that of the Second Circuit. Relying, with little or no discussion, on this Court's decisions in *Perlman v. United States*, 247 U.S. 7, *Burdeau v. McDowell*, 256 U.S. 465, and *Cogen v. United States*, 278 U.S. 220, the First Circuit has said that the appealability of a suppression order depends on whether the motion was made before or after the return of the indictment. *Centracchio v. Garrity*, 198 F. 2d 382, certiorari denied, 344 U.S. 866. The court in *Centracchio*, citing the Second Circuit's *Poller* decision, indicated that an order entered on a pre-indictment motion alleging an illegal

search and seizure is appealable even though the indictment was returned before the entry of the order.

Cases

Pre-indictment Motions.—The leading case is *Centracchio v. Garrity*, 198 F. 2d 382 (1952), certiorari denied, 344 U.S. 866, which is discussed above. There, the district court, after an indictment was returned, denied a pre-indictment motion to suppress the use before a grand jury of cancelled checks and bank statements given to internal revenue agents. Subsequently, in *Chieftain Pontiac v. Julian*, 209 F. 2d 657 (1954), the court reviewed an order entered on a pre-indictment motion for the return of books and papers given to internal revenue agents, without discussion of appealability.

THIRD CIRCUIT

Summary

The Third Circuit has followed the same principle as the Second Circuit with little discussion of the underlying rationale. In *In re Sana Laboratories*, 115 F. 2d 717, certiorari denied, 312 U.S. 688, the court held that an order denying a pre-indictment motion was appealable even though it was entered after the return of the indictment. Recently, one judge has followed that rule with "serious doubts" as to its validity in a case where the pre-indictment motion was filed after the movants had waived a hearing before the commissioner and had been bound over to await grand jury action. *United States v. Murphy*, 290 F. 2d 573, pending on a petition for a writ of

certiorari, No. 317, this Term. In that case, Judge Staley, although holding for the court that *In re Sana Laboratories* was controlling, said that he himself believed that the order was interlocutory. Citing *Carroll v. United States*, 354 U.S. 394, and the more recent Fifth Circuit decisions (see *infra*, pp. 17-20), he stated that criminal proceedings had been commenced, within the meaning of *Cogen*, "so as to make the order interlocutory and not appealable once the appellants were brought before the Commissioner * * *." 290 F. 2d at 575, note 2.

Cases

1. *Post-indictment Motions*.—In *United States v. Wheeler*, 256 F. 2d 745 (1948), certiorari denied, 358 U.S. 873, an order granting a motion to suppress records given to an internal revenue agent was held, with no discussion, to be interlocutory and non-reviewable on appeal by the government. The court relied on *Carroll v. United States*, 354 U.S. 394.

2. *Pre-indictment Motions*.—The leading case is *In re Sana Laboratories*, 115 F. 2d 717 (1940), certiorari denied, 312 U.S. 688. There an order which denied a motion to suppress books, papers, and records seized without warrant by Alcohol Tax Agents was held appealable although the order was made after the return of an indictment. This principle has been followed with little discussion in: *United States v. Bianco*, 189 F. 2d 716 (1951) (order granting a pre-indictment motion to suppress lottery materials seized incident to arrest); *United States v. Murphy*, 290 F. 2d 573 (1961), pending on a petition for a writ of cer-

tiorari, No. 317, this Term (order denying a motion filed before indictment but after arraignment to suppress sugar and currency seized incident to arrest). See also *Dugan & McNamara v. Clark*, 170 F. 2d 118 (1948) (order denying a pre-indictment motion to quash a grand jury subpoena *duces tecum* held non-appealable under *Cobbledick v. United States*, *supra*).

3. *Miscellaneous*.—In *United States v. Sincero*, 190 F. 2d 397, an arrest warrant was issued by a commissioner in the District of Maryland based on a statement made by the movant to an investigator of the Immigration and Naturalization Service in Philadelphia. The order entered in the District Court for the Eastern District of Pennsylvania denying the motion to quash the arrest warrant and suppress the statement was held to be independent of the criminal case and appealable both because the motion was made before an indictment had been returned against the movant and because it was made in a district other than that where the criminal proceeding was pending.

FOURTH CIRCUIT

Summary

Relying on the "essential character" of the motion, and the "circumstances under which it is made"—the approach stated by this Court in *Cogen v. United States*, *supra*, 278 U.S. at 225—the Fourth Circuit has evolved a flexible rule of appealability. Where a motion for suppression was made after arraignment and was clearly part of the criminal case,

the fact that it preceded the indictment has not been considered decisive. In *United States v. Williams*, 237 F. 2d 149 (1955), Judge Parker rejected the time the indictment was returned as the sole criterion for deciding whether an order on a motion to suppress is appealable. In that case he dismissed an appeal by the government because the criminal case had already been begun by arraignment proceedings before the motion was filed. Since this motion solely related to pending proceedings, the court held that the order was interlocutory and not appealable. On the other hand, the court has held that an order granting a motion to suppress and return ballots and other election materials which was made after the indictment was returned was reviewable on appeal by the government. *United States v. Ponder* (1956), 238 F. 2d 825. The court reasoned that, since all citizens of the State are entitled to reasonable access to public documents and therefore similar applications to suppress and return could be filed, the case was similar to a motion filed by a stranger to the criminal case, which under *Cogen* is appealable; the impounding of the election materials had an effect beyond the criminal case; the documents were impounded prior to indictment; and the impounding petition and order were separately entitled in the district court from the criminal proceeding which was subsequently brought. The court therefore held that the impounding, seizure, suppression, and return of the documents were in a proceeding which was independent of the pending criminal case.

Cases

1. *Post-indictment Motions.*—*United States v. Ponder*, 238 F. 2d 825 (1956) (see the discussion above). This case was cited in *Carroll v. United States*, 354 U.S. at 404, note 17, 406, note 19, as an instance where a post-indictment motion was appealable because it was in fact independent of the criminal case.

2. *Pre-indictment Motions.*—In *United States v. Williams*, 227 F. 2d 149 (1955), an order granting a motion made before indictment but after arraignment for the suppression of liquor seized incident to arrest was held non-reviewable on appeal by the government (see the government's brief in *DiBella*, pp. 45-46).

In *Austin v. United States*, No. 8317, decided November 21, 1961, the district court denied a motion, based on both the Fourth and Fifth Amendments, to enjoin the United States Attorney from presenting to the grand jury tax records and other information allegedly obtained by fraud, on the ground that it was inappropriate to decide this kind of motion before indictment. No arraignment proceedings or any steps in a criminal case had apparently been held. Without discussing appealability, the court of appeals assumed jurisdiction and directed the district court to hold a hearing on the merits of the motion.

FIFTH CIRCUIT

Summary

Until recently the Fifth Circuit treated orders on motions brought before indictment as automatically

appealable. This rule was applied before *Cogen* to an order denying a motion to quash a search warrant. *Voorhies v. United States*, 299 Fed. 275. The same rule was applied after *Cogen* to an order on a motion made after arrest and arraignment but before indictment. *Foley v. United States*, 64 F. 2d 1.

Recently, however, the Fifth Circuit has adopted a different rule. In *Zacarias v. United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935 (see our brief in *DiBella*, pp. 45-46), the court held that an order denying a motion to suppress narcotics seized incident to arrest which was filed after arraignment but before indictment is not appealable. The court reasoned that this motion was related to a pending criminal case and that therefore the order was not final. The rule has been recently reaffirmed and extended to a motion made in the district of seizure which is not the district of the offense, where a complaint had been filed and a commitment hearing held prior to the motion. *United States v. Koenig*, 290 F. 2d 166, pending on writ of certiorari, No. 93.

Cases

1. *Post-indictment Motions*.—The Fifth Circuit has refused to allow appeals from orders deciding post-indictment motions: *Knott v. United States*, 163 F. 2d 983 (1947) (order denying a motion made prior to trial for suppression and return of money seized incident to arrest); *Peterson v. United States*, 260 F. 2d 265 (1958) (order denying a post-indictment motion to suppress money seized without a warrant). See also *United States v. Ashby*, 245 F. 2d 684 (1957)

(order granting a motion to suppress records and papers given by the defendant's wife to the Internal Revenue Service and dismissing the indictment); the court of appeals held that the government could appeal the dismissal of the indictment under the Criminal Appeals Act, 18 U.S.C. 3731, but did not decide the question whether independent review could be had as to the suppression order).

2. *Pre-indictment Motions*.—The earlier cases stating, with little or no discussion, that pre-indictment motions are appealable are: *Voorhies v. United States*, 299 Fed. 275 (1924) (order granting a motion to quash a search warrant but refusing to order the return of liquor seized under it); *Atlanta Enterprises, Inc. v. Crawford*, 22 F. 2d 834 (N.D. Ga.) (1927) (in a proceeding in the district court to test the validity of the seizure of prize fight films under a search warrant, the district court said that its order would be appealable); *Foley v. United States*, 64 F. 2d 1 (1933), certiorari denied, 289 U.S. 762 (order denying a post-arraignment motion challenging the seizure of documents, books, papers, and records seized under a search warrant); *Eastus v. Bradshaw*, 94 F. 2d 788 (1938) (appeal by the United States Attorney from an order issued pursuant to a formal bill in equity enjoining all government agencies forever from using writings, statements, and memoranda delivered to the Internal Revenue Service in any criminal case); *Turner v. Camp*, 123 F. 2d 840 (1941) (order denying a petition to restrain the United

¹ This case was explained in *Cogen, supra*, 278 U.S. at 226-227, note 5, as based on the National Prohibition Act.

States Attorney from using before the grand jury a truck and liquor seized incident to arrest); *White v. United States*, 194 F. 2d 215 (1952), certiorari denied, 343 U.S. 930 (order denying a motion to prevent the government from using in a threatened criminal prosecution books and papers given to internal revenue agents); *United States v. Harte-Hanks Newspapers*, 254 F. 2d 366 (1958), certiorari denied, 357 U.S. 938 (appeal by the government from an order granting the defendant's motion to suppress books and records obtained under a subpoena *duces tecum* from being used before the grand jury).

The later cases which have refused to apply the time of indictment as automatically determining appealability are: *Zacarias v. United States*, 261 F. 2d 416 (1958), certiorari denied, 359 U.S. 935 (see the discussion *supra*, p. 18); *Saba v. United States*, 283 F. 2d 244 (1960), pending on a petition for a writ of certiorari, No. 34, this Term. In *Saba* the district court denied a pre-information motion to suppress and return money and other items^{*} seized incident to arrest. Relying on *Zacarias*, the court of appeals held that the order was not appealable.

3. *Miscellaneous*.—In *United States v. Koenig*, 290 F. 2d 166 (1961), pending on writ of certiorari, No. 93, the court of appeals held that an order granting the suppression of evidence, but not its return, made in the district of seizure, which is different from the district

^{*}The defendant's counsel in *Saba*, however, stated at the hearing that he would not be satisfied with return of the materials seized if they could be used at the trial. See the government's brief in opposition, No. 34, this Term, p. 6. Thus, the motion was in effect a motion to suppress alone.

of the offense and indictment, is not appealable by the government. The motion was made after a complaint had been filed and a commitment hearing held in order to obtain the suppression and return of large sums of money (which were allegedly stolen), slacks, sunglasses, and various other items.

SIXTH CIRCUIT

Summary

In an early decision, the Sixth Circuit held that a petition to quash a search warrant issued under the National Prohibition Act and seeking the return of alcohol seized under it was an independent proceeding and was therefore appealable even though the petition was filed after the return of the indictment. The court, in reaching its decision, emphasized that the petition sought the return of the items seized, relying upon *Perlman v. United States*, 247 U.S. 7, and *Burdeau v. McDowell*, 256 U.S. 465. *Dowling v. Collins*, 10 F. 2d 62, 63-64, certiorari denied, 270 U.S. 660. Subsequently, the Sixth Circuit held without discussion that an order denying a post-indictment motion to suppress is interlocutory and non-appealable. *Thomas v. United States*, 128 F. 2d 617.

The primary concern in the recent decisions has been whether a district court should entertain a pre-indictment motion for the suppression of evidence which is based on other than Fourth Amendment grounds. The Sixth Circuit has taken the position that only violations of the Fourth Amendment can be raised and decided before indictment. The court

seems to have assumed that orders deciding pre-indictment motions based on the Fourth Amendment are appealable.

Cases

1. *Post-indictment Motions*.—*Dowling v. Collins*, 10 F. 2d 62 (1926), certiorari denied, 270 U.S. 660 (see the discussion above). This case was explained in *Cogen, supra*, 278 U.S. at 226–227, note 5, as being based on the special provisions of the National Prohibition Act. In *Carroll, supra*, however, 354 U.S. at 394, the Court suggested that the decision was based on the fact that the motion emphasized the return of property rather than its suppression as evidence.

Thomas v. United States, 128 F. 2d 617 (1942) (see the discussion above).

2. *Pre-indictment Motions*.—The cases, in which the Sixth Circuit has assumed, without discussion, that pre-indictment motions based on Fourth Amendment grounds are appealable, are: *Benes v. Canary*, 224 F. 2d 470 (1955), certiorari denied, 350 U.S. 913 (motion to enjoin the United States Attorney from presenting to the grand jury books and records allegedly obtained by internal revenue agent under false pretenses); *Biggs v. United States*, 246 F. 2d 40 (1955) (petition to suppress before the grand jury books alleged taken by revenue agents under false pretenses).

SEVENTH CIRCUIT

Summary

Prior to *Cogen*, the Seventh Circuit indicated that a pre-indictment motion was final and therefore sep-

arately appealable by reviewing such an appeal without discussion of its appealability. *Veeder v. United States*, 252 Fed. 414 (1918), certiorari denied, 246 U.S. 675. This position has been reaffirmed after *Cogen*, again without discussion. *Homan Mfg. Co. v. Russo*, 233 F. 2d 547 (1956).

Cases

1. *Post-indictment Motions*.—*Socony Mobil Oil Co. v. United States*, 275 F. 2d 227 (1960) (order denying a motion for the return of impounded documents originally obtained for grand jury use under a subpoena *duces tecum* held not appealable).

2. *Pre-indictment Motions*.—The court has indicated, without discussion, that pre-indictment motions are appealable: *Veeder v. United States*, 252 Fed. 414 (1918), certiorari denied, 246 U.S. 675 (order denying a motion to quash a search warrant and for the return of books, accounts, ledgers, and other items seized under it); *United States v. Various Documents, Papers and Books of Briggs & Turivas*, 278 Fed. 944 (1921), certiorari denied, 258 U.S. 617 (appeal by the government from an order of a United States Commissioner, granting a pre-indictment motion to quash a search warrant and the return of the books and papers seized under it; the court of appeals held that the commissioner's decision was not appealable but indicated that it would have had jurisdiction to review such an order issued by the

¹ This case is discussed in some detail in *United States v. Maresca*, 266 Fed. 713, 723 (S.D. N.Y.), discussed *supra*, p. 4. See also the government's petition for certiorari in *Veeder*, arguing that the order was not appealable. No. 952, Oct. Term, 1917.

district court); *Homan Mfg. Co. v. Russo*, 233 F. 2d 547 (1956) (order denying a motion to quash a subpoena *duces tecum* and enjoining government officials from using the documents obtained under it before the grand jury).

EIGHTH CIRCUIT

Summary

The Eighth Circuit has held, without discussion, that orders on motions brought after arraignment but before indictment are appealable. *Goodman v. Lane*, 48 F. 2d 32 (1931).

Cases

Pre-indictment Motions.—The cases holding that orders on pre-indictment motions are appealable are: *Goodman v. Lane*, 48 F. 2d 32 (1931) (order dismissing, without prejudice to its renewal at trial, a post-arraignment but pre-indictment bill in equity which sought suppression and return of liquor seized incident to a warrantless arrest); *Schwimmer v. United States*, 232 F. 2d 855 (1956) (order denying a pre-indictment motion to quash a subpoena *duces tecum* issued in a grand jury investigation for books, records, files, log-book, and diaries because it constituted an unreasonable search and seizure).

NINTH CIRCUIT

Summary

The Ninth Circuit decisions follow the same rules of appealability as those prevailing in the Second

Circuit. Orders granting or denying post-indictment motions have long been considered interlocutory decisions which are not independently appealable. *E.g.*, *Jacobs v. United States*, 8 F. 2d 981 (1925). Orders on preindictment motions are deemed appealable even though the motion was not made until after the complaint in the criminal case was filed with the commissioner and the movant was bound over for grand jury action. *Freeman v. United States*, 160 F. 2d 69 (1946). The rationale in *Freeman* seems to be, as in the Second Circuit, that the commissioner's power is exhausted when the suppression proceeding is heard before the district court and therefore the suppression proceeding is not part of a pending criminal case.

Cases

1. *Post-indictment Motions*.—The cases holding that orders deciding post-indictment motions are not appealable are: *United States v. Marquette*, 270 Fed. 214 (1921) (government appeal from an order granting a motion for suppression and return of liquor seized without a warrant); *Jacobs v. United States*, 8 F. 2d 981 (1925) (order denying a post-information motion to quash a search warrant and suppress property seized under it); *United States v. Rosenwasser*, 145 F. 2d 1015 (1944) (government appeal from an order granting a post-information motion to suppress books and records seized without a warrant).

2. *Pre-indictment Motions*.—The Ninth Circuit's decision that pre-indictment motions are appealable are: *Freeman v. United States*, 160 F. 2d 69 (1946) (order denying a motion filed before indictment but

after complaint for the return of documents seized under a commissioner's warrant); *Weldon v. United States*, 196 F. 2d 874 (1952) (minute order denying a motion made after preliminary hearing to suppress and return money, a cigarette case, an index card, and two bills of sale seized incident to arrest, held not be appealable; the court of appeals noted that, if an actual order had been entered by the district court on the motion, the order would have been independently appealable); *Hoffritz v. United States*, 240 F. 2d 109 (1956) (order denying a motion to suppress books, records, checks, receipts, and invoices allegedly obtained by revenue agents through fraud and trickery was held appealable even though an indictment was returned while the cause was pending on appeal).

TENTH CIRCUIT

We have found no Tenth Circuit decisions on this issue.

DISTRICT OF COLUMBIA CIRCUIT

Summary

The District of Columbia Circuit has held that an order granting a motion to suppress narcotics filed after indictment was final in relation to the government and therefore was appealable, even though an order denying such a motion would not be final as to a defendant. *United States v. Cefaratti*, 202 F. 2d 13, certiorari denied, 345 U.S. 907; *United States v. Carroll*, 234 F. 2d 679. This position, however, was over-

ruled by this Court's decision in *Carroll v. United States*, 354 U.S. 394.

The Court has held that orders on pre-indictment motions are appealable only if the order is made before the indictment is returned. *Nelson v. United States*, 208 F. 2d 505, certiorari denied, 346 U.S. 827.

Cases

1. *Post-indictment Motions.*—*United States v. Cefaratti*, 202 F. 2d 13 (1952), certiorari denied, 345 U.S. 907 (see the discussion above); *United States v. Carroll*, 234 F. 2d 679 (1956), reversed, 354 U.S. 394 (see the discussion above).

Even though, prior to *Carroll*, the District of Columbia Circuit allowed appeals by the government from orders granting post-indictment motions to suppress made under Rule 41(e), F.R. Crim. P., in *United States v. Stephenson*, 223 F. 2d 336 (1955), the court held that an order of the district court granting the defendant's post-indictment motion to suppress a recording and the transcript of a telephone conversation was not appealable. The court reasoned that, since the motion did not involve an illegal search and seizure, it did not come within Rule 41(e) and therefore the district court might decide to admit the evidence at trial; consequently, the court said, the ~~order~~^{order} was not final as to the government and was not independently appealable.

2. *Pre-indictment Motions.*—In *United States v. Mattingly*, 285 Fed. 922 (1922), the court held that an order granting a pre-information motion for the suppression and return of liquor seized under a

search warrant was interlocutory where the information was returned prior to the entry of the order. The court, however, did not indicate that the reason for its determination was that the indictment was returned prior to the order. On the other hand, in *Nelson v. United States*, 208 F. 2d 505 (1953), certiorari denied, 346 U.S. 827, an order denying a pre-indictment motion to suppress papers obtained by a Congressional committee was held to be interlocutory and non-appealable, because the indictment was returned before the order was issued.

3. *Miscellaneous.*—*Dickhart v. United States*, 16 F. 2d 345 (1926). The court held that an order denying a motion for the return of liquor seized under a search warrant where the motion was made after the movant had been acquitted on the criminal charge was appealable. This decision was cited in *Cogen* and *Carroll* for the proposition that an order is appealable when the motion is filed after the termination of the criminal case. 278 U.S. at 226; 354 U.S. at 403-404.

Respectfully submitted.

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